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Tagore Law Lectures, 1899.

THE

LAW RELATING TO EASEMENTS

IN

BRITISH INDIA.

BY

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AND

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SECOND EDITION.

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PREFACE

TO THE SECOND EDITION.

THE flattering reception accorded to the first edition of this work by the English and Indian Press, and the many important decisions which have since appeared, encourage me in the hope that a second edition may now prove acceptable to the Indian legal community.

The whole work has been carefully corrected and revised, and its original scope has been extended by the introduction of new topics and decisions.

Chapters III, VI, VIII, and IX have been recast with a view to a more practical and systematic treatment of the subject-matter.

To the same end, Chapter XI (dealing with the disturbance of easements) has undergone alteration and extension (*see*, in particular, Part III (4) (*a*), (*b*), and (*c*), I and II), and greater prominence has been given to the Indian decisions relating to the question of relief by injunction or damages.

The extremely important decision of the House of Lords in *Colls* v. *Home and Colonial Stores, Limited* (1904), App. Cas., 179, on the extent of the prescriptive right to light, has thrown into opposite camps the general law of India and the special statutory law of the Indian Easements Act, and has necessitated a revision of, and additions to, those parts of Chapters III, VIII, IX, and XI which deal with ancient lights.

The effect of a diminution, instead of as formerly an enlargement, of ancient lights being to increase the burthen on the servient tenement, is another interesting consequence

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of the same decision, and has been noticed in Chapters VIII and IX.

Part V of Chapter VI has been supplemented by a reference to the acquisition of statutory easements in England.

Recent English decisions in *Wheaton* v. *Maple & Co.* (1893), 3 Ch., 48; *Kilgour* v. *Gaddes* (1904), 1 K. B., 457; and *Morgan* v. *Fear* (1906), 2 Ch., 406; (1907) App. Cas., 425, have necessitated additions to Chapter VII on the somewhat complicated question of the capacity of a tenant to acquire prescriptive easements either as against his own, or a different, landlord, or as against a tenant of the same, or a different, landlord, and have suggested a comparison of the provisions of the Indian Limitation and Easements Acts.

I gratefully acknowledge the valuable suggestions contained in a review of the first edition, which appeared in the *Statesman* of August 14, 1904. These I have endeavoured to follow by adding Part V to Chapter III, on the subject of "Party-walls," and by inserting in Part I, B, of Chapter IV a short summary of the law relating to "Fences," and a footnote on pp. 225, 226 developing the principle of *Hawkins* v. *Wallis* (1763), 2 Wils., 173.

So, too, in accordance with the suggestion that a second edition of this work should contain some inquiry into the real meaning of the decision in *Keppell* v. *Bailey* (1834), 2 Myl. & K. 517, I have endeavoured in footnote form on p. 12 to show that, whilst it is still true that no new kind of easement can be arbitrarily created by the owner of land, the law is not averse from the adaptation of existing easements to the requirements of scientific discovery and the progress of civilisation.

I have endeavoured to make the book more of a commentary on the Indian Easements Act, and to notice the variations from the general law contained in that enactment.

The Appendices remain the same as in the first edition, except that the Civil Procedure Code, Act V of 1908, has displaced the Code of 1882 in Appendix X, and Appendix XII has been cut out.

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I have added a Table of Statutes (English Statutes and Indian Acts and Regulations) and a List of Abbreviations. The latter shows the full titles of the reports from which the cases have been cited, and the periods covered by them respectively.

The English and Indian cases have been brought down to the end of 1908, and a few later English cases in 1909 have been inserted as addenda.

Finally, I must express my indebtedness to Mr. R. Mitchell of the Calcutta Bar for his kind assistance in supplying me with notes of recent decisions reported in the Calcutta Weekly Notes, which I was unable to obtain in England.

F. P.

LINCOLN'S INN,
April, 1909.

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PREFACE

TO THE FIRST EDITION.

THE present work is the embodiment and amplification of lectures delivered in connection with the Tagore Law Professorship on the subject of Easements in British India.

The lectures have been presented in the form of a treatise, with a view to greater practical utility than could have been obtained from preserving them in their original form, and have been amplified by the introduction of the cognate subjects of Nuisances, Rights in Gross, and Licenses (*see* Chapters IV and XII).

Part III of Chapter I contains a geographical summary of the law relating to Easements in British India as it rests in Statute, or otherwise, in the different provinces and Presidency-towns.

The whole of the English Prescription Act and Indian Easement Act, and the material portions of the other principal Indian enactments relating to Easements, have been incorporated in Appendices with references to the text.

At the head of each chapter will be found paged headings of its contents, and marginal notes have been inserted throughout the chapters themselves, corresponding to the headings. This expedient has been adopted as a means of ready reference and as a partial substitute for a lengthy index.

The English and Indian Case Law has been brought down to the end of 1903, but owing to the protracted, though unavoidable, delay in going through the press, the only means of including the more recent cases has been in the form of Addenda, and an Appendix containing a summary of the more important English rulings.

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In this connection, and in reference to pages 80, 81, 85, to 87 of the text, should be specially noticed the very important decisions of the Appeal Court in *Warren* v. *Brown* (1902), 1 K. B., 15 (reversing Wright, J., and overruling *Lanfranchi* v. *Mackenzie* and *Dickinson* v. *Harbottle*), and in *Home and Colonial Stores, Limited* v. *Colls* (1902), 1 Ch., 302, on the question of what amounts to a substantial interference with ancient lights. *See* Appendix XII, Case Nos. (2) and (3).

Further, the recent case of *Cowper* v. *Laidler* (1903), 2 Ch., 337, forms an instructive and interesting addition to the text in Chapter XI on the subject of relief by damages or injunction. *See* Appendix XII, Case No. 9.

The subject of Easements in British India has been dealt with from a practical, as well as an academical, point of view, and frequent and sometimes lengthy quotations have been made from English and Indian authorities in the hope of making the work not only of interest and value to students of law, but also of utility to the higher branches of the legal profession and to practitioners in the lower courts of the mofussil where extensive reference to law reports is impossible.

My thanks are specially due to Mr. P. O'Kinealy of the Calcutta Bar for his valuable advice and assistance, at all times most kindly and freely given, in the preparation of this work and the lectures on which it is founded.

I must also express the obligation I am under to Mr. Justice Henderson of the Calcutta High Court, and to Mr. Knight and Mr. J. G. Woodroffe of the Calcutta Bar, for having given me the benefit of their advice and experience on various matters connected with the text and scheme of the book.

I have further to acknowledge the assistance I have derived from such standard English works as Gale on "Easements" and "The Law of Easements" by Mr. J. L. Goddard.

In conclusion, I must thank Mr. R. Mitchell of the Calcutta Bar for his assistance in the correction of a large portion of the proofs and for supplying me with notes on the Indian cases for 1903.

F. P.

February, 1904.

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LIST OF ABBREVIATIONS.

Abbreviation.	Full Title.	Period Covered.
A. & E.	*See* Ad. & E.	
A. C. J.	Appellate Civil Jurisdiction.	
Ad. & E.	Adolphus and Ellis' English Queen's Bench Reports	1834–1841
And.	Anderson's English Common Pleas Reports	1534–1604
Agra H. C. R. N. W. P.	Agra High Court Reports	1866–1868
App. Cas.	(Preceded by number of report) Law Reports, Appeal Cases	1875–1890
App. Cas.	(Preceded by year only) Law Reports, Appeal Cases	since 1890
Atk.	Atkyn's English Chancery Reports.	1736–1754
B. L. R.	Bengal Law Reports	1862–1875
B. & Ad.	Barnewall and Adolphus' English King's Bench Reports	1830–1834
B. & Ald.	Barnewall and Alderson's English King's Bench Reports	1817–1822
B. & C.	Barnewall and Cresswell's English King's Bench Reports	1822–1830
B. & C.	Bosanquet and Puller's English Common Pleas Reports	1796–1804
B. & S.	Best & Smith's English Queen's Bench Reports	1861–1869
Beav.	Beavan's English Roller Court Reports.	1838–1866
Bing.	Bingham's English Common Pleas Reports	1822–1834
Bing. N. C.	Bingham's New Cases, English Common Pleas	1834–1840
Black.	William Blackstone's English King's Bench Reports	1746–1779
Bligh	Bligh's House of Lords Reports	1819–1821
Bligh N. S.	Bligh's House of Lords Reports, New Series	1827–1837
Bom. H. C.	Bombay High Court Reports	1862–1875
C. A.	Court of Appeal.	
C. B.	Common Bench Reports.	1845–1856

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C. B. N. S.	Common Bench Reports, New Series	1856–1865
C. M. & R.	Crompton, Meeson, & Roscoe's English Exchequer Reports	1834–1835
C. P.	Common Pleas (*see* L. R. C. P.).	
C. P. D.	Common Pleas Division (*see* L. R. C. P. D.).	
C. & J.	*See* Cr. & J.	
C. & K.	Carrington & Kirwan's English Nisi Prius Reports	1843–1850
C. & M.	Crompton & Meeson's English Exchequer Reports	1832–1834
C. & P.	Carrington & Payne's English Nisi Prius Reports	1823–1841
Cal. L. R.	Calcutta Law Reports (O'Kinealy & Henderson)	1877–1883
Cal. W. N.	Calcutta Weekly Notes	since 1896
Cal. W. R.	Calcutta Weekly Reporter (Sutherland)	1864–1876
Camp.	Campbell's English Nisi Prius Reports	1807–1816
Ch.	Law Reports, Chancery Division	since 1890
Ch. D.	Law Reports, Chancery Division	1875–1890
Cl. & F.	Clark & Finnelly's House of Lords Reports	1831–1846
Coke's Rep.	*See* Rep.	
Cr. M. & Ros.	*See* C. M. & R.	
Cr. & J.	Crompton & Jervis' English Exchequer Reports	1830–1832
Cr. & Ph.	Craig & Phillips' English Chancery Reports	1839–1841
Cro. Jac.	Croke's English King's Bench Reports, *temp.* James I.	
De G. F. & J.	De Gex, Fisher & Jones' English Chancery Reports	1859–1862
De G. J. & S.	De Gex, Jones & Smith's English Chancery Reports	1862–1865
De G. M. & G.	De Gex, Macnaghten & Gordon's English Chancery Reports	1851–1857
De G. & J.	De Gex & Jones' English Chancery Reports	1857–1859
De G. & S.	De Gex & Small's English Chancery Reports	1846–1852
Dears. C. C.	Dearsly's English Crown Cases	1852–1858
Dick.	Dickens' English Chancery Reports	1559–1797
Dougl.	Douglas' English King's Bench Reports	1778–1785
Dr. & Sm.	Drewry & Smale's English Vice-Chancellor's Reports	1859–1865
E. B. & E.	Ellis, Blackburn & Ellis' English Queen's Bench Reports	1858

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Abbreviation.	Full Title.	Period Covered.
E. & B.	Ellis & Blackburn's English Queen's Bench Reports	1852–1858
East	East's King's Bench Reports	1800–1812
Eq.	Equity Reports (*see* L. R. Eq.)	1853–1855
Exch.	Exchequer Reports (Welsby, Hurlstone, & Gordon)	1849–1856
Ex. D. / Exch. D.	Law Reports, Exchequer Division	1875–1880
F. & F.	Foster & Finlason's English Nisi Prius Reports	1856–1867
H. Bl.	Henry Blackstone's English Common Pleas Reports	1788-1796
H. L. C.	House of Lords Cases	1847–1866
H. & C.	Hurlstone & Coltman's English Exchequer Reports	1862–1866
H. & N.	Hurlstone & Norman's English Exchequer Reports	1856–1862
Hare	Hare's English Vice-Chancellors' Reports	1841–1853
Hay	Hay's Reports (Calcutta)	1862–1863
Hob.	Hobart's English King's Bench Reports	1603–1625
Holt N. P.	Holt's English Nisi Prius Reports	1815–1817
Hyde	Hyde's Reports (Calcutta)	1862–1864
I. L. R. All.	Indian Law Reports, Allahabad Series	since 1875
I. L. R. Bom.	Indian Law Reports, Bombay Series	since 1875
I. L. R. Cal.	Indian Law Reports, Calcutta Series	since 1875
I. L. R. Mad.	Indian Law Reports, Madras Series	since 1875
Ind. Jur. O. S.	Indian Jurist Reports, Old Series	1862
Ir. C. L.	Irish Common Law Reports	1849–1866
Ir. Ch.	Irish Chancery Reports	1850–1866
Ir. Eq.	Irish Equity Reports	1838–1850
Ir. L.	Irish Law Reports	1838–1850
Ir. R. C. L.	Irish Reports, Common Law Series	1866–1877
Ir. R. Eq.	Irish Reports, Equity Series	1866–1877
J. & H.	Johnson & Hemming's English Vice-Chancellor's Reports	1859–1862
Jenn. R.	Jennison's Reports (Michigan, America)	1878–1879
Jur. N. S.	The Jurist, New Series	1856–1867
K. & J.	Kay & Johnson's English Vice-Chancellors Reports	1854–1858
K. B.	Law Reports, King's Bench Division	since 1900
Key & Elph. Conv. Prec.	Key & Elphinstone's Precedents in Conveyancing.	

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L. J. C. P.	Law Journal, Common Pleas	1822-1880
L. J. Ch.	Law Journal, Chancery	since 1822
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L. J. M. C.	Law Journal, Magistrates' Cases	1826–1896
L. J. N. S.	Law Journal, New Series	since 1831
L. J. O. S.	Law Journal, Old Series	1823–1831
L. J. Q. B. (or K. B.)	Law Journal, Queen's Bench (or King's Bench)	since 1822
L. R.	Law Reports.	
L. R. C. P.	Law Reports, Common Pleas Cases.	1865–1875
L. R. C. P. D.	Law Reports, Common Pleas Division	1875–1880
L. R. Ch. App.	Law Reports, Chancery Appeal Cases	1865–1875
L. R. Ch. D.	*See* Ch. D.	
L. R. Eq.	Law Reports, Equity Cases	1865–1875
L. R. Exch.	Law Reports, Exchequer Cases	1865–1875
L. R. Exch. D.	Law Reports, Exchequer Division	1875–1880
L. R. H. L.	Law Reports, English and Irish Appeal Cases	1865–1875
L. R. H. L. Sc.	Law Reports, House of Lords Scotch Appeal Cases	1866–1875
L. R. Ind. App.	Law Reports, Indian Appeals.	since 1872
L. R. Ind. App. Supp. Vol.	Law Reports, Indian Appeals, Supplementary Volume	1872-1873
L. R. Ir.	Law Reports (Ireland), Chancery and Common Law	1877–1893
L. R. P. C.	Law Reports, Privy Council Appeal Cases	1865–1875
L. R. Q. B.	Law Reports, Queen's Bench	1865–1875
L. T. / L. T. N. S.	Law Times Reports, New Series	since 1859
Ld. Raym.	Lord Raymond's English King's Bench and Common Pleas Reports	1694–1732
Leon..	Leonard's English King's Bench, Common Pleas and Exchequer Reports	1552-1615
Lev.	Levinz's King's Bench and Common Pleas Reports	1660–1696
M. & G.	Manning & Granger's English Common Pleas Reports	1840–1845
M. & M.	Moody & Malkin's English Nisi Prius Reports	1826–1830
M. & R.	Moody & Robinson's English Nisi Prius Reports	1830–1844
M. & W.	Meeson & Welsby's English Exchequer Reports	1836–1847
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Man. & Ry.	Manning & Ryland's English King's Bench Reports	1827–1830
Marsh	Marshall's Reports (Calcutta).	1862–1863
Maule & Sel.	Maule & Selwyn's English King's Bench Reports	1813–1817
Mod.	Modern Reports	1669–1755
Moo. I. A.	Moore's Indian Appeal Cases, Privy Council	1836–1872
Moore	J. B. Moore's English Common Pleas Reports	1817–1827
Myl. & Cr.	Mylne & Craig's English Chancery Reports	1835–1840
Myl. & K.	Mylne & Keen's English Chancery Reports	1832–1835
N. S.	New Series.	
Nev. & Man.	Nevile & Manning's English King's Bench Reports	1832–1836
Noy's Rep.	Noy's English King's Bench Reports	1558–1649
O. C. J.	Ordinary Civil Jurisdiction.	
O. S.	Old Series.	
Palmer	Palmer's English King's Bench Reports	1619–1629
Per. & D.	Perry & Davison's English Queen's Bench Reports	1838–1841
Poph.	Popham's English King's Bench Reports	1591–1627
Price	Price's English Exchequer Reports	1814–1824
Q. B.	Queen's Bench Reports (Adolphus and Ellis, New Series)	1841–1852
Q. B.	(When preceded by year after 1890) Law Reports, Queen's Bench Division	1891–1901
Q. B. D.	Law Reports, Queen's Bench Division	1875–1890
R. R.	Revised Reports.	
Rep.	Coke's English King's Bench Reports (cited by Parts, not by Volumes)	1572–1617
Roll. Abr. Rolle's Ab.	Rolle's Abridgment of the Common Law.	
S. C.	Same case.	
Salk. Salkeld	Salkeld's English King's Bench Reports	1689–1712
Saund.	Saunders' English King's Bench Reports	1666–1672
Scott	Scott's English Common Pleas Reports	1834–1840
Selw. N. P.	Selwyn's Nisi Prius.	

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Abbreviations.	Full Title.	Period Covered.
Sid.	Siderfin's English King's Bench, Common Pleas and Exchequer Reports	1657–1670
Sim.	Simon's English Vice-Chancery Reports	1826–1852
Sim. & St.	Simons & Stuart's English Vice-Chancery Reports	1822–1826
Sm. L. C.	Smith's Leading Cases.	
Str.	Strange's English King's Bench Reports	1716–1747
T. R.	*See* Term Rep.	
Taunt.	Taunton's English Common Pleas Reports	1807–1819
Term Rep.	Term Reports (Durnford and East)	1785–1800
Times L. R.	Times Law Reports	since 1884
Vaughan Rep.	Vaughan's English Common Pleas Reports	1666–1673
Ventr. } Venbris }	Ventris' King's Bench (vol. i.) or Common Pleas (vol. ii.) Reports	1668–1691
Ves.	Vesey Junior's English Chancery Reports	1789–1817
Ves. Sen.	Vesey Senior's English Chancery Reports	1746–1756
W. N.	(When preceded by year only) Law Reports, Weekly Notes	since 1866
W. R.	If name of case Indian—Calcutta Weekly Reporter (Sutherland)	1864–1876
	If name of case English—Weekly Reporter, English	1852–1906
Willes	Willes' English Common Pleas Reports	1737–1758
Wms. Notes	Williams' Notes to Saunders' Reports, 2 vols.	
Y. & J.	Younge & Jervis' English Exchequer Reports	1826–1830
Yelv.	Yelverton's English King's Bench Reports	1602–1613

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ADDENDA ET CORRIGENDA.

Page 6, note 2, *for* "*Pear* v. *Lucy*" *read* "*Peers* v. *Lucy*."

" 19, . . . *for* "secondary rights" *read* "accessory rights."

" 24, line 9, *for* "the" *read* "his."

" 32, note 3, *add* "*Farquhar* v. *Newbury Rural District Council* (1909), 1 Ch., 12."

" 33, . . . *for* "customary rights" *read* "customary easements."

" 45, note 4, *for* "*Abdul*" *read* "*Abul*."

" 54, lines 4, 5, *for* "Regulation VII of 1886" *read* "Regulation VIII of 1886."

" 116, third para., *insert as footnote*, "And *see Tiruvenkatachar* v. *Desikachar* (1908), I. L. R., 31 Mad., 532."

" 119, note 9, *before* "*Bhusan Palit*" *read* "*Bidhu*."

" 130, note 3, *add* "*Tiruvenkatachar* v. *Desikachar* (1908), I. L. R., 31 Mad., 532.

" 162, note 2, *for* "*Elliott*" *read* "*Elliot*."

" 168, note 2, *add* "*Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.* (1909), 1 Ch., 37."

" 168, para. (1), *insert as footnote* "The burthen of proof that the common law right of support was*n*ot intended *to* be reserved lies on the mineral owner, *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd., ubi sup.*"

" 169, note 2, *add* "*Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd., ubi sup.*"

" 191, note 1, *for* "Chap. III, Part I" *read* "*infra*, pp. 260, 351, 491."

" 194, note 8, *for* "Chap. XI, Part III (4) (*b*)" *read* "Chap. XI, Part III, (4) (*c*) I, D."

" 202, last line, *for* "and (5) Other miscellaneous easements" *read* "(5) Easements relating to fences, and (6) Other miscellaneous easements."

" 207, note 5, *for* "*Rahini*" *read* "*Rahim*."

" 230, note 4, *add* "It is competent for a tenant for life and an immediate remainderman in fee to dedicate to the public a road over the settled land, *Farquhar* v. *Newbury Rural District Council* (1909), 1 Ch., 12."

" 232, note 3, *in each case after* "*Brocklebank* v. *Thompson, ubi sup.*" *add* "*Farquhar* v. *Newbury Rural District Council* (1909), 1 Ch., 12."

" 262, note 2, *for* "*Rosken*" *read* "*Roskell*."

" 293, note 2, *for* "*Abdul*" *read* "*Abul*."

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Page 298, line 13 from bottom, *for* "*Asphalte*" *read* "*Asphalt*."

" 299, line 17, *for* "land" *read* "law."

" 313, note 3, *for* "rule" *read* "run."

" 340, line 8, *for* "*Scott*" *read* "*Serff*."

" 411, lines 4, 8, *for* "Jac. I, c. 21" *and* "Jac. I, c. 2" *read* "21 Jac. I, c. 16."

" 411, line 5, *for* "31 Hen. VIII, c. 2" *read* "32 Hen. VIII, c. 2."

" 440, note 5, *for* "*Bejoy*" *read* "*Joy*."

" 441, note 1, *for* "*Abdul*" *read* "*Abul*."

" 557, note 4, *insert after first reference*, "A similar principle has been applied in India in a case where non-user for a series of years of an easement *aquæ ducendæ* was due either to the refusal to Government to sell the water or to the absence of water in the source of irrigation, *see Tiruvenkatachar* v. *Desikachar* (1908), I. L. R. 31 Mad., 532."

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Part I.—Easements generally.

Nature of Easements.

Apart from the ordinary rights of ownership in land and the relative or absolute obligations by which such rights are generally limited, the law permits the acquisition of certain other rights, and the imposition of certain other obligations, as ancillary to, and restrictive of, the use and enjoyment of land.

Such rights and obligations differ from the ordinary rights and duties of ownership in their want of mutuality and their capability of exact definition, and derive their distinctive character from the well-defined restrictions they impose upon the indefinite power of user which is of the essence of ordinary ownership in its widest sense.

It is in this capacity for exact limitation and in the precisely defined correlation of obligations on the one part to rights on the other, that the true significance of an *Easement* lies.

There must be a breaking off, or subtraction of, a right or rights from the *dominium* or full ownership of some person, and the annexation of such subtracted right, or rights, to the *dominium* of another person, for the beneficial or necessary enjoyment of that person's property.

It is of the essence of an easement not only that it should be appurtenant to land, but that it should be associated with two tenements, one, the tenement to which the *right* is appurtenant, called the "Dominant Tenement,"[1] the other, the tenement upon which the *burthen* is imposed, called the "Servient Tenement."[2]

Such burthen consists in the obligation either to suffer something to be done (*servitus patiendi*), or to refrain from doing something (*servitus non faciendi*), on the servient tenement for the advantage or benefit of the dominant tenement.

As familiar instance of easements may be mentioned rights of way, rights to the passage of light, air, and water.

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[1] "Tenement" is the word used in English law.—"Heritage" is the word used in the I. E. Act, V of 1882, s. 4, to express the same thing. *See* further, *infra*, Chap. II.

[2] *Ibid.*

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Taking a right of way as a familiar easement and applying thereto foregoing observations on the general nature of the right, we find that where a man acquires an easement of way over his neighbour's land, or, in other words, the right of passing and repassing over it, he, to that extent, abstracts a portion of the exclusive rights of ownership existing in his neighbour and adds them to his own.

Profits à Prendre.

Rights appurtenant to land which are supplemented by the right to enjoy the profits of the land over which they are exercised are called *Profits à Prendre*.

As instances of profits à prendre, may be given the right of one person as the owner of a certain house or farm to graze his cattle on another person's field, to take for use in his own house by himself and the members of his household the fish out of another person's tank, or to take stones from another person's land for the purpose of mending his roads.

A profit à prendre has been described in English law as something taken from the soil,[1] or as the right to take a part of the soil, or the produce of the soil.[2]

Differences between easements and profits à prendre.

This definition serves to mark certain well-defined distinctions between easements and profits à prendre.

Thus, whilst an easement, pure and simple, is merely the right appurtenant to land to do something, or require something not to be done, on the land of another, a profit à prendre is not merely the privilege to do, but the right to take and use, and is, therefore, something more than an easement.[3]

Further, while an easement can never import an interest in land, a profit à prendre which gives a right to take away a portion, or the produce, of another's soil, may be said to that extent to be an interest in land, or a possessory right.[4] Moreover, a profit à prendre, considered as a right, is an incorporeal hereditament equally with an easement, but

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[1] *Race* v. *Ward* (1855), 4 E. & B., 702; 24 L. J. Q. B., 153.

[2] *Manning* v. *Wasdale* (1836), 5 A. & E., 758 (764); 6 L. J. K. B., 59.

[3] *See Fitzgerald* v. *Firbank* (1897), 2 Ch. at p. 101.

[4] *Ibid.*

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considered as a tangible thing taken from the soil is a corporeal thing.

Another point of difference between profits à prendre and easements is that the former cannot, but the latter can, be claimed by virtue of a custom.[1]

Further, unlike an easement proper, an exclusive profit à prendre, such as a right of fishing, is capable of being trespassed upon.[2]

It is upon these distinctions that the separate existence of profits à prendre in English law is founded.

Resemblance between easements and profits à prendre.

Though distinguishable from Easements in the above respects, profits à prendre are analogous to the former rights in the sense of being associated with two tenements. As an easement is a right to do something upon, or over, another's land in respect of the land of the person exercising the right, so a profit à prendre must be not only something taken from the soil of another, or the right to take something in such manner, but also something to be used, or the right to use something, on, or in relation to, the land of the person who takes it. In other words, these two classes of rights possess the common feature of being what are called "*rights appurtenant*," that is, rights annexed to one tenement and imposing obligations on another.

Thus it has been said that "the owner of an estate may "claim, as appurtenant to that estate, a profit to be taken in "the land of another, to be used upon the land of the party "claiming the profit."[3]

Rights falling short of the requisite standard of easements or profits à prendre by being unattached to the land of the person claiming to exercise them, are usually called "Rights in Gross" and "Profits in Gross."[4]

Fusion of profits à prendre in easements in Indian law.

The separation of easements and profits à prendre in English law has not been adopted by the Indian Legislature,

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[1] *See* further, Chap. IV, Part I, B (1).

[2] *See Babán Mayacha* v. *Nagu Shravucha* (1876), I. L. R. 2 Bom. 45, 54, and Chap. IV, Part I, B (3).

[3] *Per* Erle, C.J., in *Bailey* v. *Stephens* (1862), 12 C. B. N. S. at p. 108.

[4] *See* further as to Rights in Gross, *infra* and Chap. IV, Part II, A.

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which, by the Indian Limitation Act, XV of 1877, and the Indian Easements Act, V of 1882, has placed both classes of rights in the category of easements, and thus deprived profits à prendre of their distinctive personality.[1]

At this point it will be convenient to notice the definition of "Easement" in English law and as contained in the Indian Acts relating to Easements.

Definition of "Easement" in English law.

According to English law, an easement is a privilege without profit,[2] acquired in respect of one tenement by the

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[1] *See* Act XV of 1877, s. 3, App. IV; Act V of 1882, s. 4, App. VII; and *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 Cal. L. R., 269. It is difficult to understand on what ground this fusion of the two classes of rights was intended to rest. If the change was intended solely for the object of bringing the Indian law into conformity with the continental systems of jurisprudence, it is curious that in none of the proceedings accompanying the progress of the Indian Limitation Bill and the Indian Easements Bill towards maturity, is there to be found any statement as to why in this respect the continental system was preferable to the English, or more suitable to the requirements of India. But if, as is more probable, the intention was to identify, as a matter of method or arrangement, two classes of rights between which there was asserted to be but a slender distinction, and that, a distinction not always observed, the ground of the intention does not appear to rest on sound conclusions. In the Statement of Objects and Reasons, accompanying the Indian Easements Bill of the 6th of November, 1880 (*Vide Gazette of India*, July to Dec. 1880, Part V, p. 476), the following passage occurs (that is to say): "This," referring to the explanation including profits à prendre in easements and following the definition of "Easement," "though in conformity with "continental systems of jurisprudence, is "in contravention of the English law, "which reckons, for instance, as an easement, the right to take water from a "spring on your neighbour's land, but "denies that name to a right to take grass "or gravel." As a general proposition, this must be taken as subject to the condition that the spring is the *product* of the servient tenement and, therefore, the private property of the servient owner. If the spring is one flowing from a distance and is supplied or renewed by nature it cannot be the subject of property, but is *res nullius*, and the right of strangers to take water from it cannot be exercised unless there is an additional right by easement, or otherwise, to go on to the particular land in order to get to it, *Race* v. *Ward* (1855), 4 E. & B., 702; 24 L. J. Q. B., 153; *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom., 51, 52. If the spring is one which cannot be the subject of property, it follows that it cannot be the subject of an easement which is a right or privilege affecting the property of another.

[2] This marks a point of difference between easements and profits à prendre in English law. *See* also *Pear* v. *Lucy* (1695), 4 Mod., 355, where it was said that "the word 'easement' is known in "the law; it is defined in the terms "thereof; it is a genus to several species "of liberties which one man may have in "the soil of another without claiming

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owner thereof, whereby the owner of another tenement is restricted in the full enjoyment of the rights incident thereto to the extent of being obliged to suffer, or not to do, something thereon for the advantage or benefit of the former tenement.

The former tenement is called the "Dominant Tenement," and the latter the "Servient Tenement."

Briefly, therefore, an easement is a right which the owner of the dominant tenement has in, or over, the servient tenement for the beneficial enjoyment of his land.

In *Hill* v. *Tupper*, Martin, B., described an easement as a right ancillary to the enjoyment of land.[1] *Hill* v. *Tupper*.

In the interpretation contained in section 3 of the Indian Limitation Act, XV of 1877, which applies to the whole of British India, except the territories to which the Indian Easements Act applies, it is stated that "Easement" "includes "a right not arising from contract by which one person is "entitled to remove and appropriate for his own profit any "part of the soil belonging to another, or anything growing "in, or attached to, or subsisting upon, the land of another." Indian Limitation Act, XV of 1877, s. 3.

In the territories to which the Act applies, the effect of this definition is to give to all easements a much more extensive meaning than that assigned to them by English law, and for the purposes of the Act to assimilate profits à prendre with Easements.[2]

As regards the Presidency of Madras, and the Central Provinces and Coorg, sections 26 and 27 of the Limitation Act, 1877, and the definition of "Easement" contained in section 3 of that Act, have been repealed by section 3 of the Indian Easements Act,[3] and Act VIII of 1891 has extended to the Presidency of Bombay and the North-Western Provinces and Oudh (now called the United Provinces), the

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"any interest in the land itself. It was "held to be a good custom for an in-"habitant of a certain parish to have a "way over another man's ground because "it is an *easement* and no *profit*."

[1] (1863) 32 L. J. Exch., 217 (219).

[2] *Chundee Churn Roy* v. *Shib Chunder Mundal* (1880), I. L. R., 5 Cal., 945; 6 Cal. L. R., 269.

[3] *See* App. VII.

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application of the Easements Act and the repeal of the Limitation Act.[1]

Indian Easements Act, s. 4.

Section 4s of the Indian Easements Act defines "Easement" as follows:—

"An easement is a right which the owner or occupier "of certain land possesses as such for the beneficial enjoy- "ment of that land to do and to continue to do something "or to prevent and to continue to prevent something being "done in, or upon, or in respect of, certain other land not his "own."

The explanation to the section includes in the expression "land" things permanently attached to the earth, in the expression "beneficial enjoyment," possible convenience, remote advantage and even a mere amenity, and in the expression "to do something" the removal and appropriation by the dominant owner of any part of the soil of the servient heritage, or anything growing or subsisting thereon.

This has the same effect with reference to profits à prendre as the interpretation of "Easement" in section 3 of the Indian Limitation Act.

The words "possible convenience, remote advantage, or even a mere amenity" included in the term "beneficial enjoyment," appear to open the door to other forms of easements besides those recognised by the English law.

What these new forms of easement may be, is a matter which is open to question, no cases having arisen on the subject. It is to be regretted that none of the illustrations to the section throws any light upon the possible application of such words, and the matter must therefore remain in doubt until set at rest by judicial or legislative authority.

It is possible that these words were intended to cover what may be called an *easement of prospect*, that is to say, a right to have a particular view unobstructed. The English law has refused to recognise such a right as an easement, distinguishing between matters of utility and necessity, and

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[1] *See* App. XI.

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those of mere pleasure.[1] And this would appear still to be the law in Bengal and other parts of India to which the Indian Easements Act does not apply.[2]

Result of Indian definitions.

The foregoing definitions show that easements in India are capable of being exercised not only over actual land itself, but over things permanently attached to the land, such as houses or buildings of any kind, or over anything growing on, or attached to, or subsisting upon, land, such as woods, tanks, or rivers.

The Transfer of Property Act (IV of 1882) contains certain provisions relating to easements which will be hereafter considered,[3] but it contains no definition of easements.

Nor is the term "*Easement*" defined in the General Clauses Act, I of 1868.

Rights in Gross.

There are certain rights (which may be called "*Rights in Gross*") analogous in some respects to easements, but in other respects differing materially therefrom, in connection with which the term *Easements in Gross* has sometimes been used as a mode of expression merely, and not as designating a class of rights known to the law, for the term *Easements in Gross* is clearly a legal inaccuracy and a contradiction in terms.

As distinguished from easements one of the main features of these rights is their independence of a dominant tenement.[4] Their enjoyment is altogether irrespective of the possession or ownership of land.[5]

Moreover, such rights being unconnected with the enjoyment or occupation of land cannot be annexed as incident to it.[6]

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[1] *Aldred's Case* (1738), 9 Coke's Rep., 58; *Att.-Genl.* v. *Doughty* (1752), 2 Ves. Sen., 453; and *see Dalton* v. *Angus* (1881), 6 App. Cas. at p. 824.

[2] *See* the observations of Peacock, C.J., in *Bagram* v. *Khettranath Karformah* (1868), 3 B. L. R., O. C. J., 18 (46) (52). *See* further, Chap. IV, Part II, C.

[3] *See infra*, Part II, F, and Part III, Chaps. II and VI.

[4] *Rangeley* v. *The Midland Ry. Co.* (1868), L. R., 3 Ch. App., 306; 37 L. J. Ch., 313.

[5] *Ackroyd* v. *Smith* (1850), 10 C. B. 164 (187); 19 L. J. C. P., 315 (319).

[6] *Ackroyd* v. *Smith*, *ubi sup.*

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They are merely personal rights, and are, therefore, unlike easements,[1] incapable of assignment.

Rangeley v. Midland Railway Co.

In the case of *Rangeley* v. *The Midland Railway Co.*,[2] Lord Justice Cairns clearly pointed out that there can be no such thing as an Easement in Gross.

It will be of advantage to use his own words. He said :[3] "There can be no easement properly so called unless there be "both a servient and dominant tenement. It is true that in "the well-known case of *Dovaston* v. *Payne*, Mr. Justice Heath "is reported to have said with regard to a public highway that "the freehold continued in the owner of the adjoining land "subject to an easement in favour of the public, and that "expression has occasionally been repeated since that time. "That, however, is hardly an accurate expression. There can "be no such thing according to our law, or according to the "Civil Law, as what I may term an Easement in Gross. An "easement must be connected with a dominant tenement."

Familiar instances of a Right in Gross is a private right of way unconnected with a dominant tenement,[4] and a public right of way.[5]

Profits à prendre in gross.

Rights unattached to the land of the person claiming them, but otherwise resembling profits à prendre, are called *Profits à Prendre in Gross.*

Thus the owner of land may grant to a man and his heirs the right to take all the wood or all the grass that shall grow upon the land of the grantor. The exercise of this right, irrespective of a tenement belonging to the grantee, would bring it within the category of profits à prendre in gross.[6]

And as a right in gross cannot be claimed as appurtenant to land and is, therefore, no easement, because it is wholly unconnected with a dominant tenement and its necessities, so profits à prendre in gross are similarly distinguishable

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[1] *Ibid.*; *Thorpe* v. *Brumfitt* (1873), L. R., 8 Ch., 650 (655).

[2] (1868) L. R., 3 Ch. App., 306.

[3] *Ibid.* at p. 310.

[4] *Ackroyd* v. *Smith*, *ubi sup.*

[5] *See infra* under "Public Rights of Way," and Chap. IV, Part. II, A (2)

[6] *Bailey* v. *Stephens* (1862), 12 C. B. N. S., 91 ; 31 L. J. C. P., 226. *See* also *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. N. S., 687 ; 34 L. J. C. P., 309.

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from profits à prendre which are appurtenant to land and limited to the needs of a dominant tenement.[1]

Acquisition of Easements.

In connection with the acquisition of easements, a distinction is to be observed between Easements and what are called "Natural Rights." Easements are acquired through the act or presumed act of man, whereas natural rights, as will hereafter be seen,[2] are by law annexed to land, and are enjoyed *ex jure naturæ* without the aid or intervention of man by every owner of land.

In British India easements may be acquired—

(1) By grant or covenant, express, implied, or presumed;

(2) under the Indian Limitation Act and the Indian Easements Act by use or enjoyment of the right for a period of years or independently of such Acts by prescription;

(3) by virtue of a custom;

(4) by will;

(5) by virtue of a legislative enactment.

These modes of creation and acquisition of easements will be fully discussed hereafter.[3]

Variety of easements.

It has been said that there may be as many Easements "as there are ways whereby the liberty of a house or tenement "may be restrained in favour of another tenement, for liberty "and servitude are contraries, and the abatement of the one "is the being or enlarging of the other."[4]

How limited.

But though to every burthen there is a correlative benefit, and it is, in one sense, true to say that to limit the number of burthens and benefits which can be imposed on, and annexed to, land is unduly to restrain the freedom of ownership and the enjoyment of property, yet the law does limit the number of easements to certain well-known and well-defined rights, and will not permit obligations of a novel and fanciful character

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[1] *Bailey v. Stephens; Shuttleworth v. Le Fleming, ubi sup.*

[2] *Infra*, under "Natural Rights," and Chap. V.

[3] *See infra*, and Chap. IV, Part I, B (1), Chap. VI, and Chap. VII.

[4] Gale on Easements, 8th Ed., p. 22.

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to be created so as to pass with the servient tenement to any person into whose occupation the servient tenement may come.[1]

This limitation is based on grounds of expediency. All validly created easements, in the sense of rights legally appurtenant, lie in grant, and the benefit and burthen of them pass with the dominant and servient tenements as incidental to the ownership of land. To place unusual and unknown rights and obligations on the same level would be seriously to affect the value of land as a marketable commodity and curtail its utility.[2]

Keppell v. *Bailey*.

In *Keppell* v. *Bailey*,[3] which is a leading case on the subject, Lord Chancellor Brougham said:[4] "There are certain known "incidents to property and its enjoyment; among others, "certain burthens wherewith it may be affected, or rights

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[1] *Keppell* v. *Bailey* (1834), 2 Myl. & K., 517 (535); *Ackroyd* v. *Smith* (1850), 10 C. B., 164 (188); 19 L. J. C. P., 315 (319); *Hill* v. *Tupper* (1863), 2 H. & C., 121; 32 L. J. Exch., 217; *Leech* v. *Schweder* (1874), L. R., 9 Ch. App., 463 (475); 43 L. J. Ch., 487 (491).

[2] But though the gate is closed on the creation of novel and fanciful easements, the law has never shown itself averse from the adaptation of existing and recognised easements to new and improved conditions of life, such, for example, as owe their existence to the requirements of a higher civilisation, to scientific discovery, or to the growth and development of trade (*see* the observations of Lord St. Leonards, L.C., in *Dyce* v. *Lady James Hay* (1852), 1 Macq. Sc. App. at pp. 312, 313. Instances of this adaptation under the sanction of the law are to be found in the application of the easement of support of a building by land to the case of a sewer carried through private property by a public body under statutory powers (Gale, 8th Ed., p. 114, note (*e*)); in the easement which permits the discharge of sewage on to another's land or into a private stream (*Ibid.* pp. 439, 440); in the way-leaves which Gas and Water Companies are permitted to purchase from private landowners (Michael and Will on "The Law relating to Gas and Water," 5th Ed., 243, 244); in the way-leaves and other modified easements which may be acquired for the purposes of an Electric Lighting undertaking (Will on "The Law relating to Electric Lighting, Traction and Power," 3rd Ed., 56, 58, 101, 106, 107, 133, 212); and, generally, in the recognition of the right of Railway Companies and other public bodies by implied grant to all such easements as are necessary to the reasonable enjoyment of the land acquired by them having regard to the purposes of the acquisition. *See Caledonian Railway Co.* v. *Sprot* (1857), 2 Macq. Sc. App. 449; *Eliot* v. *North Eastern Railway Co.* (1863), 10 H. L. C. 333; *Serff v. Acton Local Board* (1886), 31 Ch. D. 679. It is true that force of circumstances usually obliges a way-leave (*i.e.* the right to lay pipes or lines) to be the subject of bargain between the undertakers and the private owner, but it seems that it is none the less a validly created easement when purchased, to which the usual incidents of an easement will attach (Michael and Will, *ubi sup.* 243).

[3] (1834) 2 Myl. & K., 517.

[4] *Ibid.* at p. 535.

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"which may be created and enjoyed over it by parties other "than the owner; all which incidents are recognised by the "law. . . . So in respect of enjoyment, one may have the "portion and the fee simple, and another may have a rent "issuing out of it, or the tithes of its produce, or an easement, "as a right of way upon it, or of common over it. And such "last incorporeal hereditaments may be annexed to an estate "which is wholly unconnected with the estate affected by the "easement, although both estates were originally united in the "same owner, and one of them was afterwards granted by him "with the benefit, while the other was left subject to the "burthen. All these kinds of property, however, all these "holdings, are well known to the law and familiarly dealt with "by its principles. But, it must not be supposed that incidents "of a novel kind can be devised and attached to property at the "fancy or caprice of any owner. It is clearly inconvenient "both to the science of the law and to the public weal that "such latitude should be given. . . . Great detriment would "arise and much confusion of rights, if parties were allowed to "invent new modes of holding and enjoying real property, and to "impress upon their lands and tenements a peculiar character, "which should follow them into all hands however remote."

Ackroyd v. *Smith.*

And in the well-known case of *Ackroyd* v. *Smith*,[1] Cresswell, J., said: "It is not in the power of a vendor to create any "rights not connected with the use or enjoyment of the land "and annex them to it: nor can the owner of land render it "subject to a new species of burthen, so as to bind it in the "hands of an assignee."[2]

No limit to valid obligations as between grantor and grantee.

But although an unknown and unusual obligation cannot be attached to land so as to pass with it into whatever hands the land may go, there is nothing to prevent a grantor binding himself by covenant to allow any right he pleases over his property.[3]

For example, a covenant that a person shall have an uninterrupted view from a drawing-room window is not a

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[1] *Ubi sup.*

[2] 10 C. B. at p. 188; 19 L. J. C. P. at p. 319.

[3] *Hill* v. *Tupper*; *Leech* v. *Schweder*, *ubi sup.*

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covenant which can be attached to land so as to bind it in the hands of the covenantor's assignees. Such a right, though enforceable by the covenantee against the covenantor, is of no avail against the covenantor's assignees unless they took with notice of the right. In *Leech* v. *Schweder*,[1] Lord Justice Mellish said: "Where the right comes into existence by "covenant, the burthen does not run at law with the servient "tenement at all; but a Court of Equity says that a person "who takes it with notice that such a covenant has been made, "shall be compelled to observe it. That is the ordinary case "where there is such a covenant as I before referred to, that "a person shall have an uninterrupted view from his drawing-"room window, because the law will not allow the owner of "land to attach an unusual and unknown covenant to the "land, so that a man, who buys the property in the market "without knowing that it is subject to any such burthen, "would find that some previous owner had professed to bind "all subsequent owners by an obligation not to obstruct the "view which somebody else would have from the windows "of his house. In such a case as that, though the man "who makes the covenant is liable, yet those claiming under "him are not liable at law; but the Court of Equity says that "if a purchaser has taken the land with notice of that contract, "it is contrary to equity that he should take advantage of that "rule of law to violate the covenant. But in the case of a "grant of a well-known easement, such as a right to light, "or a watercourse, or a right of way, or any of the numerous "easements which are well known to the law, when they are "once validly created the right passes at law, and the owner "or occupier of the dominant tenement may maintain an "action against the occupier of the servient tenement if the "right is interfered with."

Leech v. *Schweder*.

Easements conveniently fall into two principal classes according to their nature and the manner of their enjoyment, "affirmative" and "negative."

Affirmative and Negative Easements.

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[1] (1874), L. R., 9 Ch. App. at p. 475; 43 L. J. Ch. at p. 491.

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Having regard to the obligation on the servient owner either to suffer something to be done, or not to do something, on, or over, the servient tenement, the classification of easements under "affirmative" and "negative" appears to provide a practical and useful division of the subject and to be founded on a logical basis.

Origin of the division.

Moreover, this division of the subject was borrowed by the English law from the Civil Law as comprehending the most practical classification of easements, and until nearly the middle of the nineteenth century remained unsupplemented.

"Continuous" and "Discontinuous," "Apparent" and "Non-apparent."

In the edition of 1839 of Gale on Easements is found the first mention of a further division of easements into "Continuous" and "Discontinuous," "Apparent" and "Non-apparent." The same division appears in the subsequent editions of the work, and has been adopted in the Indian Easements Act in which connection it will presently be noticed.

This division of the subject appears to have originated in the year 1804 in the Code Napoleon, and in this connection it will be of advantage to quote the words of Lord Blackburn in the case of *Dalton* v. *Angus*.[1] "Those who framed the *Code* "*Napoleon* had to make one law for all *France*. To facilitate "their task, they divided servitudes into classes, those that "were continuous and those that were discontinuous, and "those that were apparent and non-apparent (Code Civil, "Arts. 688, 689). Those divisions and the definitions were, as "far as I can discover, perfectly new, for though the difference "between the things must always have existed, I cannot find "any trace of the distinction having been taken in the old "French law, and it certainly is not to be found in any "English authority before Gale on Easements in 1839."

One of the results of the French legislation founded on this division was a change in the French law of Easements relating to continuous and discontinuous easements. This change was not, and has never been, received in English law.[2]

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[1] (1881) 6 App. Cas. at p. 821.

[2] *Ibid.*

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Definition of Affirmative Easements.

Affirmative Easements have been defined as those which entitle the dominant owner to make active use of the servient tenement, or to do some act which, in the absence of an easement, would be a nuisance or a trespass.[1]

Definition of Negative Easements.

Negative Easements have been defined as those which restrain the servient owner from exercising an ordinary right of ownership over his land.[2]

In other words, an affirmative easement may be described as a right to *use* in a given manner the servient tenement, and a negative easement may be described as a right in the dominant owner to a *forbearance* on the part of the servient owner from using the servient tenement in a given manner.[3]

Divisions used in Indian Acts.

The terms "continuous" and "discontinuous," "apparent" and "non-apparent" are used in the Indian Easements Act for the division of easements, but no mention is made in the Act of the terms "affirmative" and "negative," although they were contained in the bill of 1879,[4] and the bill introduced on the 6th November 1880.[5]

"Affirmative" and "Negative" no longer in Indian Acts.

The terms "affirmative" and "negative" are also mentioned in section 26 of the Limitation Act, XV of 1877, and were to be found in the corresponding section, section 27, of the Limitation Act, IX of 1871, which has been repealed by the former Act.

Continuous and Discontinuous Easements.

Indian Easements Act, s. 5.

To borrow the definitions given in section 5 of the Easements Act,[6] "a continuous easement is one whose enjoyment "is, or may be, continual without the act of man."

"A discontinuous easement," on the other hand, "is one "that needs the act of man for its enjoyment."

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[1] Sweet's Law Dict., p. 303. This was the positive servitude in Roman law which, in respect of the owner, was said to consist *in patiendo*; *i.e.* in his duty to forbear from molesting the other in the given user of the subject, Austin, Juris., 3rd Ed., Vol. II, p. 838.

[2] *Ibid*. This was the negative servitude in Roman law which, in respect of the owner, was said to consist *in non faciendo*; *i.e.* in his duty to forbear from using the subject in the given manner or mode, Austin, Juris., *ubi sup*.

[3] *See* Austin, Juris., *ubi sup*., and *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 776, *per* Fry, J.

[4] One of the six codifying bills laid before the Indian Law Commission, 1879, *see* s. 5.

[5] *See* s. 5 at p. 476, *Gazette of India*, 1880, July to December, Part V.

[6] *See* App. VII.

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Illustration (*a*) to the above section provides as an instance of a continuous easement the right annexed to a particular person's house to receive light by the windows without obstruction by his neighbour.

As an instance of a discontinuous easement, Illustration (*b*) gives a right of way annexed to one person's house over another person's land. Another instance of a discontinuous easement is the right to draw water.

Apparent and Non-apparent Easements, Indian Easements Act, s. 5.

Section 5 of the Indian Easements Act defines Apparent and Non-apparent Easements as follows :—

"An apparent Easement is one the existence of which is "shewn by some permanent sign which, upon careful inspection "by a competent person, would be visible to him.[1] A non-"apparent easement is one that has no such sign."

Permanent and Limited Easements. Indian Easements Act, s. 6.

According to section 6 of the Indian Easements Act,[2] an easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence, or become void, or voidable, on the happening of a specified event, or on the performance or non-performance of a specified act.

Instances of limited easements occur in rights of way. A man may have a right of way for agricultural purposes only. Such a right is limited as it is not a right for all purposes,[3] and a man may grant a way for all purposes except that of carrying coals.[4] A right of way can also be granted subject to periodical obstruction or destruction by the grantor. In an old case it was held that "if a man have a right of "way through another man's house, he cannot use it at

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[1] Taken from *Pyer* v. *Carter* (1857), 1 H. & N. 916 (922), where it was said that by "apparent signs" must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject.

[2] *See* App. VII.

[3] *Jackson* v. *Stacey* (1816), Holt N. P., 455; and *see Brunton* v. *Hall* (1841), 1 Q. B., 792. *See* further on this subject, Chap. VIII, Part I, C.

[4] *The Marquis of Stafford* v. *Coynby* (1827), 7 B. & C., 257; and *see* Chap. VIII, Part I, C.

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"unreasonable hours, nor bring an action for stopping the "way without notice and request to have it opened."[1]

Inconsistent Easements.

It has been said that inconsistent easements cannot co-exist.[2]

In this respect easements and natural rights are alike though the similarity springs from different causes.

Natural rights, otherwise inconsistent, are through the operation of their legal origin, limited by each other so as to obviate such inconsistency.[3]

Where, for example, two adjoining landowners possess natural rights in water neither riparian owner can use the water in such a manner as to interfere with the equal common right of his neighbour; the rights of each are limited by the rights of the other, and the limitations imposed arise out of the legal origin of the rights.

On the other hand, the rule that easements inconsistent with each other cannot co-exist, does not depend upon the origin of the rights themselves, but upon the legal prohibition which disables a servient owner from creating in favour of a third person an easement which would be inconsistent with, or lessen the utility of, the easement already granted to the dominant owner.

This prohibition proceeds upon the legal principle that a man cannot derogate from his grant.[4]

Subordinate Easements.

Although, as has been seen, inconsistent easements cannot co-exist, there is nothing to prevent a second easement being acquired as subordinate to, although in its nature inconsistent with, one already existing where the subject-matter admits of it.[5]

For example, where there is a right to a flow of water for the working of a mill, there is nothing to prevent a second easement being created for the diversion of the water in such

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[1] *Tomlin* v. *Fuller* (1681), 1 Mod. 27.

[2] *See* this subject fully considered in Goddard on "Easements," 6th Ed., 34.

[3] *See infra* under "Inconsistent Natural Rights."

[4] *See* Chap. VI, Part IV, B.

[5] *Mason* v. *Shrewsbury and Hereford Railway Co.* (1871), L. R. 6 Q. B., 578; 40 L. J. Q. B., 293.

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manner as not to interfere with the full exercise of the first right.[1]

So in the case of rights in gross, it has been held in India, that the right of Mahomedans to erect a tazia on certain land and go thereon at the time of the Mohurrum was not incompatible with the right of Hindus to go on the same land at another period of the year.[2]

Subordinate Easements are contemplated by section 9 of the Indian Easements Act. Under this section subject to section 8, which enables any one to impose an easement on his property according to the circumstances and extent of his transferable interest therein, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement.[3] Indian Easements Act, s. 9.

Illustrations (*a*) and (*b*) to the section are instances of subordinate easements. Ills. (*a*) and (*b*).

A has in respect of his mill a right to the uninterrupted flow thereto, from sunrise to noon, of the water of *B's* stream. *B* may grant to *C* the right to divert the water of the stream from noon to sunset, provided that *A's* supply is not thereby diminished.[4]

A has in respect of his house a right of way over *B's* land. *B* may grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way, provided that *A's* right of way is not thereby obstructed.[5]

Accessory Easements,[6] or secondary rights as they are called by section 24 of the Indian Easements Act,[7] or secondary easements as they are designated in Gale on Easements,[8] are rights to do acts necessary to secure the full enjoyment of the principal easement. Accessory Easements.

They must not be confused with subordinate easements

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[1] *Rolle* v. *White* (1868), L. R., 3 Q. B., p. 302; 37 L. J. Q. B., 116.

[2] *Ashraf Ali* v. *Jagan Nath* (1884), I. L. R., 6 All., 497.

[3] *See* App. VII.

[4] Ill. (*a*).

[5] Ill. (*b*).

[6] *See* further, Chap. VIII, Part II.

[7] *See* App. VII.

[8] 8th Ed., p. 492.

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which have already been described as independent and inconsistent easements capable of imposition upon the same servient heritage when the subject admits of it.

Indian Easements Act, s. 24.

Section 24 of the Indian Easements Act deals with accessory easements, and after defining the conditions under which they are to be exercised describes them as "rights to do acts "necessary to secure the full enjoyment of an easement."

Ill. (*e*).

Illustration (*e*) to this section may be taken as an instance of accessory easements.

The illustration is as follows:—

A, as owner of a certain house, has a right of way over *B's* land. The way is out of repair, or a tree is blown down and falls across it. *A* may enter on *B's* land, and repair the way, or remove the tree from it.

Easements of necessity.

Easements of necessity comprise an important class of easements.

The principles which govern their acquisition, transfer, mode and extent of enjoyment, and extinction will be fully discussed in later chapters.[1]

It will be sufficient here to briefly explain them.

Necessary right of way.

An easement of necessity is a right which an owner or occupier of land must of necessity exercise on, over, or in another's land for the enjoyment of his own.

The most ordinary instance of an easement of necessity arises where a man is unable to obtain any access to, or derive any benefit from, his own land without a right of way over his neighbour's land.

Pomfret v. *Ricroft*.

The general rule as to a way of necessity is given by Mr. Sergeant Williams in his notes to the well-known case of *Pomfret* v. *Ricroft*.[2] "So when a man having a close sur- "rounded with his own land grants the close to another in fee "for life or years, the grantee shall have a way to the close "over the grantor's land as incident to the grant; for without "it, he cannot derive any benefit from the grant. This

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[1] Chap. VI, Part IV, A; Chap. VIII, Part I, B; Chap. IX, Part II, A; Chap. X, Part I (*d*).

[2] (1681) 1 Saund., 322; Wms. Notes at p. 570.

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"principle seems to be at the foundation of that species of "way which is usually called a way of necessity."

This statement of the law has been followed by the English Courts in subsequent decisions.[1]

Other easements of necessity.

On the same principle of necessity a right to dig minerals or the soil of another has been held to carry with it the right to dig through the surface land to gain such minerals or soil, and when they have been gained to carry them away over the land.[2]

On the same principle a coal owner having the right to dig pits in another's land for the purpose of getting the coal was held entitled to the right, as incident thereto, of fixing such machinery as would be necessary to draw such coal from the pits.[3]

Indian Easements Act, s. 13 (*a*), (*c*), and (*e*).

Clauses (*a*), (*c*), and (*e*) of section 13 of the Indian Easements Act, deal with easements of necessity, and provide that they can arise in favour of either the transferee of the dominant tenement, or the transferor of the servient tenement, according as the dominant or servient tenement is transferred, or retained, as the case may be, and this is the same under the general law.[4]

Necessity must be absolute.

With reference to this class of Easements, it is important to remember that they are not founded upon a more convenient or advantageous use of the dominant tenement, but upon *absolute necessity* as meaning that the dominant tenement could not otherwise be used at all.[5]

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[1] *See Pinnington* v. *Galland* (1853), 9 Exch., 12; and *Gayford* v. *Moffatt* (1868), L. R., 4 Ch. App., 133.

[2] *Goold* v. *Great Western Deep Coal Co., Ld.* (1865), 13 L. T., 109; *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; *Ruabon Brick and Terra Cotta Company* v. *Great Western Ry. Co.* (1893), 1 Ch., 427.

[3] *Dand* v. *Kingscote* (1840), 6 M. & W., 174.

[4] *See* App. VII and Chap. VI, Part VI, A.

[5] *See* per Stirling, L.J., in *Union Lighterage Co.* v. *London Graving Dock Co.* (1902), 2 Ch. at p. 573. So far as the Indian Easements Act is concerned, this is evidently the meaning of the words "necessary for enjoying" in s. 13 (*a*), (*c*), and (*e*), *see* Statement of Objects and Reasons, *Gazette of India*, July to Dec. 1880, Part V at p. 477; *Chunilal* v. *Manishankar* (1893), I. L. R., 18 Bom., 616 (625). And the same view has been taken by the Indian Courts, both under, and independently of, the Indian Easements Act. For cases under the Act, *see Wutzler* v. *Sharpe* (1893), I. L. R., 15 All., 270 (281); *Municipality of City of Poona*

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That the necessity should be absolute seems consistent with the designation of the right and the requirements of reason.

For it may fairly be said that if a man is to have an obligation exacted from him whereby, as may be seen from the foregoing illustrations of easements of necessity, his land suffers detriment, and he himself is put to inconvenience, annoyance, and even loss, such obligation ought only to be permitted as a matter of necessity.

Mere inconvenience or disadvantage, suffered by the dominant owner or occupier, should not be the foundation of the right.

Only one way of necessity.

Thus a man cannot exercise an easement of necessity over his neighbour's property if there is any other means whereby he can enjoy his own property.[1] Nor can there be more than one way of necessity.[2]

Suggested modification in India of rule of one way of necessity.

It has been suggested as a question for consideration whether this rule might not be relaxed in India whenever, for reasons of caste or religion, the existence of only one way would be productive of extreme inconvenience.[3]

But there has been no actual decision in India that the general principle above stated ought in particular circumstances to be departed from.[4]

Limits of extent and method of enjoyment.

It is also a rule to be remembered in connection with easements of necessity that the extent and method of their enjoyment must be limited to the purposes for which the dominant

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v. *Vaman Rajarap Gholap* (1895), I. L. R., 19 Bom. 797; *Krishnamarazu* v. *Marraju* (1905), I. L. R., 28 Mad., 495. For cases outside the Act, *see Charu Surnokar* v. *Dokouri Chunder Thakoor* (1882), I. L. R., 8 Cal., 956; 10 Cal. L. R., 577; *Purshotam* v. *Durgoji* (1890), I. L. R., 14 Bom., 452; *Esubai* v. *Damodar Ishvardas* (1891), I. L. R., 16 Bom., 552; *Chunilal* v. *Manishankar*, *ubi sup*. In England, though there is a conflict of authority on the point, the better opinion is the same way, *see* Goddard on Easements, 6th Ed., p. 38.

[1] *Wutzler* v. *Sharpe* (1893), I. L. R., 15 All., 270; *The Municipality of the City of Poona* v. *V. Rajaram Gholap* (1894), I. L. R., 19 Bom., 797; *Holmes* v. *Goring* (1874), 2 Bing., 76; 6 Moore, 166.

[2] *Bolton* v. *Bolton* (1879), 11 Ch. D., 968; *see* further, Chap. VI, Part IV, A, and Chap. VIII, Part I, B.

[3] *Esubai* v. *Damodar Ishvardas* (1892), I. L. R., 16 Bom., 552. And *see Municipality of City of Poona* v. *Vaman Rajarap Gholap* (1894), I. L. R., 19 Bom., 797 (801).

[4] *Krishnamarazu* v. *Marraju* (1905). I. L. R., 28 Mad., 495.

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heritage is transferred or retained.[1] For the present, this will be sufficiently explained by reference to Illustrations (*a*), (*b*), and (*n*) to section 13 of the Indian Easements Act.

Thus, if the dominant heritage be used for agricultural purposes only, the transferor retaining it or the transferee acquiring it can have a way of necessity thereto for agricultural purposes only.

Quasi-easements. Indian Easements Act, s. 13.

It will be convenient at this point to notice *quasi*-easements, as these rights are included with easements of necessity in section 13 of the Indian Easements Act.

Quasi-Easements may be described as conveniences to which an owner subjects one part of his property for the benefit of another. Whenever such parts are separated by grant or devise on the part of the owner of what is called the quasi-dominant heritage, these conveniences, in the absence of a stipulation to the contrary, are taken as easements by the grantee or devisee.[2]

In like manner if the quasi-dominant heritage is retained, and the quasi-servient heritage is granted or bequeathed, these conveniences will, *under the Indian Easements Act*, in the absence of a contrary intention, expressed or necessarily implied, be reserved as easements by the person retaining the quasi-dominant heritage.[3]

But in England, and in those parts of India where the Indian Easements Act is not in force, it is settled law (subject to certain well recognised exceptions) that, where the dominant tenement is retained, these conveniences will not be reserved as easements without express words of reservation.[4]

It is to be observed that, as soon as the parts to which the conveniences are attached, and on which they are imposed respectively, are separated, the conveniences become easements, but not till then. Hence, it is presumed, the term quasi-easements.

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[1] *See infra*, Chap. VIII, Part I, B (3).

[2] *See* Statement of Objects and Reasons of Easements Bill of 1880, *Gazette of India*, July to Dec. 1880, Part V, p. 477.

[3] *Ibid.*

[4] *See* Chap. VI, Part IV, B.

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Illustration (*c*) to section 13 of the Indian Easements Act may be taken as affording an instance of quasi-easements arising on the grant of the dominant tenement.

That illustration is as follows: *A* sells *B* a house with windows overlooking *A's* land, which *A* retains. The light which passes over *A's* land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. *B* is entitled to the light, and *A* cannot afterwards obstruct it by building on the land.

Natural Rights.

Next comes the subject of *Natural Rights*,[1] or, as they are sometimes called, *Natural Easements*.

Natural rights, as their name imports, are those incidents and advantages which are provided by nature for the use and enjoyment of a man's property.

These rights are treated by law as the ordinary incidents of property and annexed to land wherever land exists.

Generally speaking, it may be said that the function of natural rights is to secure to the owner of land the full enjoyment thereof undiminished by any tortious acts on the part of his neighbour.

Instances of natural rights.

In illustration of these natural rights may be noticed the right of every owner of land to so much light and air as come vertically thereto[2]; to the support of his land naturally rendered by the adjacent and subjacent soil of another person[3]; and to the flow of water in a natural stream and to its transmission in its accustomed course.[4]

Indian Easements Act, s. 7.

Section 7 of the Indian Easements Act deals with natural rights.

The illustrations to the section furnish familiar examples of natural rights which it is not at present necessary to notice in detail.

Natural rights: rights *ex jure naturæ*.

Natural rights are by law annexed to, and are inherent in, land *ex jure naturæ*, of natural right, and exist *primâ facie* in

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[1] *See* further, Chap. V.

[2] Gale on Easements, 8th Ed., p. 314; Indian Easements Act, s. 7, Ill. (*d*), App. VII.

[3] Gale, 8th Ed., p. 372; Indian Easements Act, s. 7, Ill. (*e*), App. VII.

[4] Gale, 8th Ed., p. 238; Indian Easements Act, s. 7, Ill. (*h*), App. VII.

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all cases as between a landowner and his neighbour, otherwise, as Mr. Goddard says in his work on Easements,[1] "no "man would be assured that his land would not at any moment "be rendered useless by a neighbour's act otherwise lawful, "or a neighbour might deprive a landowner of the benefit of "certain things which in the course of nature have been pro-"vided for the common good of mankind."

Exist *primâ facie* in all cases between landowner and neighbour.

Further, natural rights are rights *in rem*, that is, enforceable against all who may violate them, and they are either affirmative, as rights to do something, or negative, as rights which every owner of immoveable property has, that his neighbour shall not disturb the natural conditions under which he enjoys his property.

Are rights *in rem*.

Natural rights, though resembling easements in some respects, are clearly distinguishable from them.

The essential distinction between easements and natural rights appears to lie in this that easements are *acquired restrictions* of the complete rights of property, or, to put it in another way, *acquired rights* abstracted from the ownership of one man and added to the ownership of another, whereas natural rights are themselves part of the complete rights of ownership, belong to the ordinary incidents of property and are *ipso facto* enforceable in law.

Essential distinction between easements and natural rights.

Natural rights are themselves subject to restriction at the instance of easements.

Section 7 of the Indian Easements Act classifies the rights which are so capable of restriction. For example, the natural right of support in a landowner may be restricted by virtue of an easement acquired by his neighbour or neighbours. Such right may take the form of doing something in the adjacent or subjacent soil so as to cause subsidence.[2]

So also a right to restrict the natural right to an uninterrupted flow of water may be the subject of an easement.[3]

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[1] 6th Ed., p. 3.

[2] See *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348.

[3] *Wright* v. *Howard* (1823), 1 Sim. & St., 190; 24 R. R., 169; 1 L. J. (O. S.) Ch., 94; *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S., 590.

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The effect of the creation of an easement adverse to the natural right is to cause the suspension of the natural right during the continuance of the easement.

Upon the extinction of the easement the natural right revives.

Inconsistent natural rights.

Inconsistent natural rights cannot co-exist. It has already been pointed out that there is a similarity between easements and natural rights in this respect, but that the principle on which the right is founded is different. The reason that natural rights can never be inconsistent is this, that the law for purposes of general benefit and convenience obviates any inconsistency which might arise by causing natural rights to fit into and be limited by each other. It is this mutuality which obviates conflict between them.[1]

Thus "natural rights are subject to the rights of adjoining "owners, who, for the benefit of the community, have and "must have rights in relation to the use and enjoyment of "their property that qualify and interfere with those of their "neighbours, rights to use their property in the various ways "in which property is commonly and lawfully used."[2]

Primâ facie in India,[3] as in England, every proprietor of land on the banks of a stream or non-navigable river is entitled to that moiety of the soil of the river or stream which adjoins to his land, and the legal expression is, that each is entitled to the soil of the stream or river *usque ad medium filum aquæ*. "Of the water itself, there is no separate "ownership; being a moving and passing body, there can be "no property in it. But each proprietor of land on the banks "has a right to use it; consequently all the proprietors have

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[1] *See supra* under "Inconsistent Easements"; *Wright* v. *Howard*, *ubi sup.*, *Bryant* v. *Lefever* (1879), 4 C. P. D., 172; 48 L. J. Q. B., 380; and *The First Assistant Collector of Nasik* v. *Shahji Dasrath Patil* (1878), I. L. R., 7 Bom. at p. 212, and *see* the remarks in Goddard on Easements, 6th Ed., p. 33.

[2] *Per* Bramwell, L.J., in *Bryant* v. *Lefever* (1879), 4 C. P. D. at p. 176.

[3] *Bhageerathee Debea* v. *Greesh Chunder Chowdhry* (1863), 2 Hay, 541; *Hunooman Dass* v. *Shama Churn Bhutta* (1862), 1 Hay, 426; *Kali Kissen Tagore* v. *Joodoo Lall Mullick* (1879), 5 Cal. L. R. (P. C.), 7; L. R., 6 I. A., 190; and see Dorr's Law of Riparian Rights, &c., p. 113.

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"an equal right, and, therefore, no one of them can make "such a use of it, as will prevent any of the others from "having an equal use of the stream, *when it reaches them*. . . ."[1]

Each proprietor's "use of the stream must not interfere "with the equal common right of his neighbours; he must not "injure either those whose lands lie below him on the banks "of the river, or those whose lands lie above him."[2]

It being understood that natural rights can never be inconsistent with each other, it follows that natural rights cannot be affected by each other. The user of a natural right, however long continued, would not impose a burthen upon another's land or affect his natural rights in any way.[3]

Licenses.

The topic of *Licenses*, though forming the subject of an independent chapter, deserves passing mention here.[4]

Their nature.

In the first place, it should carefully be observed that there is a fundamental difference between Licenses and Easements.

Differences between Licenses and Easements.

A license passes no interest, and neither alters nor transfers property in anything, but is a mere personal right to do on the land of the grantor something which, without such license, would be unlawful; whereas an easement is attached to land, and so long as it continues, the benefit and burthen of it continue also, and are enforceable by all and against all into whose hands the dominant and servient heritages respectively come.

English definition of license. *Thomas* v. *Sorrell*.

A familiar definition of license in English law is to be found in an old English case[5] where it was said "a dis- "pensation or license properly passes no interest, but only "makes an action lawful which without it had been unlawful; "as a license to hunt in a man's park; to come into his house; "are only actions which, without license, had been unlawful."

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[1] *Per* Leech, V.C., in *Wright* v. *Howard* (1828), 1 L. J. (O. S.) Ch. at p. 99.

[2] *Ibid.*

[3] *See* Goddard on Easements, 6th Ed., p. 34; and *Baldpson* v. *Hoddinott* (1857), 1 C. B. N. S. at p. 611.

[4] Chap. XII.

[5] *Thomas* v. *Sorrell* (1679), Vaughan Rep., 351, quoted by Tindal, C.J., in *Muskett* v. *Hill* (1839), 5 Bing. N. C. at p. 707, and by Alderson, B., in *Wood* v. *Leadbitter* (1845), 13 M. & W. at p. 844.

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Indian definition.

A definition of license is contained in section 52 of the Indian Easements Act and runs as follows :—

Indian Easements Act, s. 52.

"Where one person grants to another or to a definite "number of other persons, a right to do, or continue to do, in "or upon the immoveable property of the grantor, something "which would, in the absence of such right, be unlawful, and "such right does not amount to an easement or an interest in "the property, the right is called a license."

The personal character which attaches to a license when not coupled with a grant renders it, with one exception, a subject for enjoyment by the licensee alone,[1] and for the same reason enforceable only against the licensor.[2]

The exception above mentioned occurs in section 56 of the Indian Easements Act which provides that in the absence of a different intention expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee, but that, with that exception, a license cannot be transferred by the licensee, or exercised by his servants or agents.

License coupled with a grant.

When, however, a license is coupled with a grant to the licensee and his assigns, it is assignable.[3]

Thomas v. *Sorrell*.

In the old case of *Thomas* v. *Sorrell*[4] instances are given of what a grant may be.

"But a license to hunt in a man's park and carry away "the deer killed to his own use; to cut down a tree in a "man's ground, and carry it away the next day after to his "own use; are *licenses* as to the acts of hunting and cutting "down, but as to carrying away the deer killed, and tree cut "down, they are *grants*."

Thus a mere license is something quite different from a license coupled with the creation of an interest in immoveable property or right of easement. When that exists in a valid

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[1] *Ramakrishna* v. *Unni Chuck* (1892), I. L. R., 16 Mad., 280; Gale on Easements, 8th Ed., p. 2.

[2] Gale, *ubi sup.*; Indian Easements Act, s. 59; and *see Roffey* v. *Henderson* (1851), 15 Q. B. 574.

[3] *See Muskett* v. *Hill* (1839), 5 Bing. N. C. at p. 707.

[4] *Ubi sup.*

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form, it operates as a contract or grant, and is subject to the same incidents, and is as binding and irrevocable as any other contract or grant.[1]

Accessory licenses.

As the law provides for accessory easements or rights to do acts necessary to secure the full enjoyment of the principal easement, so the law provides for accessory licenses necessary for the enjoyment of any interest or the exercise of any right.

Indian Easements Act, s. 55.

Section 55 of the Indian Easements Act provides that all licenses necessary for the enjoyment of any interest or the exercise of any right are implied in the constitution of such interest or right and describes such licenses as accessory licenses.

Public rights of way.

The next class of rights deserving of special mention are certain rights which are capable of being acquired by the public in general and are known as public rights of way.[2]

Being unconnected with a dominant tenement they are not easements but rights in gross.

Rangeley v. *The Midland Railway Co.*

In *Rangeley* v. *The Midland Railway Co.*, Cairns, L.J., said[3]: "In truth, a public road or highway is not an "easement, it is a dedication to the public of the occupation "of the surface of the land for the purpose of passing and "repassing. . . . It is quite clear that it is a very different "thing from an ordinary easement, where the occupation "remains in the owner of the servient tenement subject to the "easement."

Illustration (*e*) to section 4 of the Indian Easements Act shews that these rights are not recognised as easements by that Act.

Limit of the right.

Prima facie, a public right of way is the right of the public in general to pass and repass along a highway.[4] User of the

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[1] *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98.

[2] *See* further, *infra*, Chap. IV, Part II, A (2).

[3] (1868) L. R., 3 Ch. App. at p. 311 *f*; 37 L. J. Ch. at p. 316.

[4] *Reg.* v. *Pratt* (1855), 4 E. & B., 860; *Rangeley* v. *Midland Railway Co.*, *ubi sup.*; *St. Mary Newington* v. *Jacobs* (1871), L. R., 7 Q. B., 47; 41 L. J. M. C., 72; *Harrison* v. *Duke of Rutland* (1893), 1 Q. B., 142; and *see* further, *infra*, Chap. IV, Part II, A (2).

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highway by a member, or members, of the public for any other purpose would be in law a trespass.[1]

Subject to the right of way, the soil of the road and every right incident to the ownership of the soil remain in the owner of the property.[2]

St. Mary Newington v. *Jacobs*.

And in the case of *St. Mary Newington* v. *Jacobs* it was said[3]: "The owner who dedicates to public use as a highway a portion "of his land, parts with no other right than a right of passage "to the public over the land so dedicated, and may exercise all " other rights of ownership not inconsistent therewith."

How acquired.

Public rights of way arise by dedication in favour of the public by the owner of the property over which the rights are exercised.[4]

It will be seen hereafter that the dedication is founded on a presumption derived from long and uninterrupted user on the part of the public.[5]

Not to be confused with easements acquired by a portion of the public.

Such public rights must not be confused with rights of way over land acquired by a certain portion of the public, such as the occupants of a particular number of houses, and which are easements.[6]

It is only by dedication that the general public can acquire a right of way[7]; whereas the inhabitants of a particular place can acquire rights of easement over land by grant, actual or presumed,[8] or by custom.[9]

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[1] *Reg.* v. *Pratt* (1855), 4 E. & B., 860. But there may be user by the public of a highway, which though technically a trespass, is nevertheless now treated by the Court as an ordinary and reasonable user of the highway as such, *see Harrison* v. *Duke of Rutland*, *ubi sup.*, and *infra*, Chap. IV, Part II, A (2).

[2] *Reg.* v. *Pratt*, *ubi sup.*, *per* Campbell, C.J., at p. 865.

[3] (1871) L. R., 7 Q. B. at p. 53; 41 L. J. M. C. at p. 75, and *see Luscombe* v. *Great Western Railway Co.* (1899), 2 Q. B., 313.

[4] *Vestry of Bermondsey* v. *Brown* (1865), 35 Beav., 226; L. R., 1 Eq., 204; *Rangeley* v. *The Midland Ry. Co.* (1868), 37 L. J. Ch., 313 (316); L. R., 3 Ch. App., 306 (311). *See* further Chap. IV, Part II, A (2).

[5] *Ibid.*, and *see Poole* v. *Huskisson* (1843), 11 M. & W., 830; and *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (1878), I. L. R., 7 Bom., 209, and Chap. IV, Part II, A (2).

[6] *See Duncan* v. *Louch* (1845), 6 Q. B., 904; and *Fatehyab Khan* v. *Muhammad Yusuf* (1887), I. L. R., 9 All., 434.

[7] *Poole* v. *Huskisson* (1843), 11 M. & W., 827; *Vestry of Bermondsey* v. *Brown*, *ubi sup.*

[8] *Vestry of Bermondsey* v. *Brown*, *ubi sup.*; but *see Brocklebank* v. *Thompson* (1903), 2 Ch., 344.

[9] Indian Easements Act, s. 18, App. VII; and *see Brocklebank* v. *Thompson*, *ubi sup.*

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Easements are capable of being acquired under and by virtue of a custom, but all customs relating to the use and enjoyment of land are not easements. Customs.

An easement, it will be remembered, is a right or privilege with or without profit which one or more individuals can exercise in respect of his or their land for the advantage or beneficial enjoyment thereof in or over the land of some other person. It is not limited to one particular place or locality, but is capable of enjoyment wherever land, the subject of ownership, is to be found.

A custom, on the contrary, is a thing of local birth, of exclusive application to a particular locality and to a particular portion of the public, and in many cases exists independently of association with a dominant and servient tenement.[1]

In *Hammerton* v. *Honey*,[2] Jessel, M.R., in describing a custom, said: "Now, what is a custom? A custom, as I "understand it, is local common law. It is common law "because it is not statute law; it is local law because it is the "law of a particular place as distinguished from the general "common law." *Hammerton* v. *Honey*.

Moreover, a custom is not subject in all respects to the same principles which apply to easements. For instance, the rule of reasonableness, which is one of the considerations in determining the validity of a custom, does not apply to easements.[3]

In England the distinction between easements and customs has been clearly defined by judicial authority.

In the case of *Mounsey* v. *Ismay*,[4] where the question was whether a custom for the freemen or citizens of Carlisle to enter upon private land for the purpose of holding horse-races there, was an easement, Martin, B., said: "In the first place, "we do not think that this custom is an easement. One of "the earliest definitions of an easement with which we are *Mounsey* v. *Ismay*.

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[1] *See Ashraf Ali* v. *Jagan Nath* (1884), I. L. R., 6 All., 251.

[2] (1876) 24 W. R., 603.

[3] Gale on Easements, 8th Ed., pp. 3–5. And *see Budhu Mandal* v. *Maliut Mandal* (1903), I. L. R., 30 Cal., 1077.

[4] (1865) 3 H. & C., 486 (497); 34 L. J., Exch., 52 (56).

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"acquainted is in the *Termes de la Ley*, and it 'is a privilege "'that one neighbour hath of another, by writing or "'prescription, without profit, as a way or sink through "'this land.' In this definition custom is not mentioned, "prescription is; and it therefore seems to point to *a privilege* "*belonging to an individual*, not a *custom which appertains to* "*many as a class*."

And the inhabitants of a place may lawfully set up a custom to hold lawful sports on a village green or other piece of land.[1]

And "a custom for the inhabitants of a parish to enter "upon certain land in the parish and erect a May-pole thereon, "and dance round and about it, and otherwise enjoy on the "land any lawful and innocent recreation at any time in the "year is good."[2]

And the inhabitants of a place may by custom have a right of way to a church or market.[3]

And there may be a custom whereby the inhabitants of a township can go on to private land for the purpose of getting water from a spring.[4]

And by virtue of a special local custom a servient owner may be under an obligation to repair.[5]

Ashraf Ali v. *Jagan Nath.*

In India the principle differentiating easements from customs as laid down in *Mounsey* v. *Ismay* was followed in a case where the right claimed by certain Hindus to go on a piece of land for the purpose of religious observances was held to be a right by custom rather than an easement, the right not being set up in respect of any dominant tenement[6] to which it was appurtenant, over a servient tenement subject to it.[7]

Easement arising by custom.

But although easements and customs are distinct in the respects above noticed, it has been decided in England,[8] and in

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[1] *Abbot* v. *Weekly* (1677), 1 Lev., 176.

[2] *Hall* v. *Nottingham* (1875), L. R., 1 Ex. D., 1.

[3] *Brocklebank* v. *Thompson* (1903), 2 Ch., 344.

[4] *Race* v. *Ward* (1855), 4 E. & B., 702.

[5] *Jones* v. *Pritchard* (1908), 1 Ch., 630 (637); 24 Times L. R., 309 (310).

[6] *Ashraf Ali* v. *Jagan Nath* (1884), I. L. R., 6 All., 497.

[7] *Ibid.*

[8] *Carlyon* v. *Lovering* (1857), 1 H. & N., 784; 26 L. J. Exch., 241; *Wright* v. *Williams* (1836), 1 M. & W., 77; 5 L. J. N. S., Exch., 107.

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India,[1] and is provided in section 18 of the Indian Easements Act, that an easement may be acquired in a particular locality under and by virtue of a custom.

This section enacts that an easement may be acquired by virtue of a local custom, and that such easements are called customary rights.[2] Indian Easements Act, s. 18.

Illustration (*b*) to the section provides for the acquisition of a right of privacy by virtue of the custom of a certain town.[3] Right of privacy.

The right of privacy arising by custom has been recognised by the Indian Courts,[4] and an action for its disturbance is maintainable by the owner, or other person in lawful occupation, of the premises in respect of which the right has been acquired.[5]

But the right of privacy is not a right which is inherent in property, and unless established by prescription, grant, or express local usage, cannot be made the subject of an actionable wrong.[6]

In England the law appears to be that the Courts will not grant relief for the mere invasion of privacy[7] except on the ground of a breach of covenant.[8]

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[1] *Mahomed Abdur Rahim* v. *Birju Sahu* (1870), 5 B. L. R., 676; *Manishankar Hargovan* v. *Trikam Narsi* (1867), 5 Bom. H. C. (A. C. J.), 42; *Kuvarji Premchand* v. *Bai Javer* (1868), 6 Bom. H. C. (A. C. J.), 143; *Shrinivas Udpirav* v. *Reid* (1872), 9 Bom. H. C., 266; *Gokal Prasad* v. *Radho* (1888), I. L. R., 10 All., 358; *Abdul Rahman* v. *Emile* (1893), I. L. R., 16 All., 69; *Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87; *Sayyad Azuf* v. *Ameerabibi* (1894), I. L. R., 18 Mad., 163; *Sri Narain Chowdhry* v. *Jodoonath Chowdhry* (1900), 5 Cal. W. N., 147; *Abdul Rahman* v. *Bhugwan Das* (1907), I. L. R., 29 All., 582; and *see* Chap. IV, Part I, B (1) (*b*).

[2] *See* App. VII.

[3] *Ibid.*

[4] *See* the cases cited in the last footnote.

[5] *Kundan* v. *Bidhi Chand* (1907), I. L. R., 29 All., 64.

[6] *Per* Markby, J., in *Mahomed Abdur Rahim* v. *Birju Sahu* (1870), 5 B. L. R., 676; and *see Shrinivas Udpirav* v. *Reid* (1872), 9 Bom. H. C., 266; and *Sayyad Azuf* v. *Ameerabibi* (1894), I. L. R., 18 Mad., 163; *Sri Narain Chowdhry* v. *Jodoonath Chowdhry*, *ubi sup.*; Chap. IV, Part I, B (1) (*b*).

[7] *Chandler* v. *Thompson* (1811), 3 Camp., 80; *Turner* v. *Spooner* (1861), 30 L. J. Ch., 801; *Tapling* v. *Jones* (1865), 11 H. L., 290; and *see Komathi* v. *Gurunada Pillai* (1866), 3 Mad. H. C., 141, where the English law was followed; and Chap. IV, Part I, B (1) (*b*).

[8] *Lord Manners* v. *Johnson* (1875), 1 Ch. D., 673; 45 L. J. Ch., 404.

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No precise period prescribed for establishment of local custom in India.

The Indian Easements Act does not say how a local custom may be established. But it has been held by the Allahabad High Court in a recent case[1] that the principle of the English common law that a custom is not proved if it is not shown to be immemorial, is not applicable to the North-Western Provinces, and that the application of such a principle to that part of India would be to destroy many customary rights of modern growth in villages and other places. In the same case the Court, in laying down the principles upon which a local custom would hold good, and in observing that the Statute law of India does not prescribe any period for the establishment of a local custom, stated that "it would be inexpedient and fraught with the risk of disturb-"ing perfectly reasonable and advantageous local usages "regarded and observed by all concerned as customs to "attempt to prescribe any such period."[2]

Part II.—History of Easements.

It is proposed to devote the second part of this chapter to a short study of the history of easements.

In the course of this historical sketch, reference will be made to the recognition of easements by the Roman law, their subsequent incorporation into English law, and their recognition by the purely Indian law, by which is meant Hindu and Mahomedan law.

Mention will then be made of the application of the English law to India prior to the passing of special Indian enactments relating to easements, and the course of Indian legislation will be traced.

A. Roman Law.—

Origin of Servitudes.

Easements or Servitudes, which are inclusive of easements, are rights of great antiquity.

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[1] *Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87. This decision has been approved in Madras and Bombay, *see* *Palaniandi Teran* v. *Puthirangondi Nandan* (1897), I. L. R., 20 Mad., 389; *Mohidin* v. *Shivlingappa* (1899), I. L. R., 23 Bom., 666.

[2] At p. 92.

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"The laws of every country must necessarily recognise "servitudes. It has been well said that the origin of "servitudes, is as ancient as that of property, of which they "are a modification."[1]

Easements known to Roman law as Servitudes.

By the Roman law, is meant the fabric of law which originated in the Twelve Tables, was gradually developed through succeeding centuries and finally took codified form under the Emperor Justinian in the sixth century after Christ. Turning to the Roman or Civil law, as it is sometimes called, upon which the legal systems of most of the continental nations are based, and from which the English common law has borrowed many maxims of proved wisdom and utility, it is found that easements were recognised under the name of Servitutes or Servitudes.

Servitudes defined.

The whole bundle of rights which went to constitute the complete ownership of property was called *Dominium*, and servitudes were regarded as fragments of such *dominium* severed from the original stock, and granted to some person other than the original proprietor in restriction of the latter's absolute ownership. For this reason, rights of servitude were called by the Roman lawyers, "*jura in re aliená*," that is to say, rights over subjects of which the property or *dominium* was vested in another or others.[2]

Such fragmentary rights, or portions of the whole rights or bundle of rights called *Dominium*, were given the name of *Servitutes*, because the property, over which they were exercised, became subject to a sort of slavery, as it were, for the benefit of the dominant owner or the person entitled to exercise these separate rights over it.

Servitude a term of wider meaning and application than easement.

The term servitude, however, meant and included something more than the duty or obligation resting on the owner or occupier of the servient tenement, and had a wider application in Roman law than the term easement usually has in English; for it was used also to express the *jus servitutis*, or

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[1] *Bagrat v. Khettranath Karformah* (1869), 3 B. L. R., O. C. J., *per* Norman, J., at p. 37.

[2] Austin, Juris., 3rd Ed., Vol. II, p. 832.

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the right corresponding with the duty, the *jus in re aliená*, whilst the term easement is generally used to express the right alone,[1] and it included profits à prendre.[2]

Prædial Servitudes.

Rural and Urban Servitudes.

The Servitudes which corresponded with easements were called Prædial Servitudes, or servitudes relating to immoveables, and Prædial Servitudes were called Rural or Urban, according as they related to land or buildings wherever situated.[3]

For example, a rural servitude meant a right of way for man, a right of passage for animals, watercourses, etc.,[4] whereas an urban servitude meant a right of support to buildings, a right to light, etc.[5]

Prædial Servitudes could be acquired by prescription.

As an easement can be acquired by uninterrupted enjoyment of the right for a particular period of years, so, in Roman-law, a title to a Prædial Servitude could be established in Roman law by uninterrupted enjoyment for a long period of time.[6]

B. English Law.—

Origin and early growth of English law of Easements.

The origin and early growth of the English law relating to Easements appears to be somewhat obscure.

There is no doubt that from the earliest times rights of easement were recognised by the ancient common law of England. There are cases in the Year Books in Michaelmas Term, 7th Edward III, and Michaelmas Term, 14th Hen. IV, fol. 25, in which the Court regarded it as settled law that if a man had an ancient house, with windows overlooking the land of his neighbour, through which light and air had been admitted from a time from which the memory of man ran not to the contrary, an action lay against any person who might obstruct such light and air.[7]

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[1] Austin, Juris., 3rd Ed., Vol. II., p. 843; Gale on Easements, 8th Ed., p. 2.

[2] Inst. Lib. II, Tit. III, 2.

[3] Inst. Lib. II, Tit. III.

[4] Inst. Lib. II, Tit. III.

[5] Inst. Lib. II, Tit. III, 1.

[6] *Ponnuswami Tevar* v. *The Collector of Madura* (1868), 5 Mad. H. C. at p. 20.

[7] *See Bagram* v. *Khettramah Karformah* (1869), 3 B. L. R., O. C. J. at p. 38.

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Easements at first subject to mixed influences.

It is certain that the English law of Easements has developed in a great measure under the influence of the common law of England, but if regard is had to the struggles of the ancient common law to evolve national expression out of the conflicting influences of the customs of the ancient Britons and the laws of the Romans, Saxons, Danes, and Normans, the impossibility of assigning one fixed origin to easements will hardly be a matter of surprise.

And this impossibility will become the more evident when it is remembered that "common law" is the custom of the realm, and grows out of those rules and maxims relating to the persons and property of men which receive the tacit assent of the people by long usage. The more varied, therefore, the influences affecting the origin of any law, the more varied such origin must be.

Whatever theories there may be as to the origin of the English law of Easements, there is no doubt that one effect of the Norman conquest was to impress the Norman jurisprudence strongly upon the common law of England, which, at that time, must have represented a fusion of Roman, Danish, and Saxon customs.[1]

Influence of Roman law on Easements.

Equally certain is it that at a later period, namely, in the reign of Henry III, when the laws of Edward the Confessor and the Norman customs were found insufficient to form a system of law suitable to the then existing state of society, both Courts of Justice and Law writers were obliged to adopt such of the rules of the digest or pandects of Justinian as were not inconsistent with English principles of jurisprudence.[2]

Moreover, the favour which Roman law has found in the sight of English Courts of Justice is exemplified by the readiness of those tribunals to accept the guidance of the Roman law in cases where no direct authority could be cited from the English books.

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[1] *See* Reeves' History of the English Law, Chap. II.

[2] *Gifford* v. *Lord Yarborough* (1828), 5 Bing. at p. 167.

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To such effect are the observations of Tindal, C.J., in the well-known case of *Acton* v. *Blundell*.[1]

For these reasons, there seems little doubt that some of the Roman law of Servitudes has found its way into the English law of Easements.

Influence of equitable doctrines on easements.

Returning to the days of Henry III, and assuming that from that time the Common Law of England began to take settled form, it is necessary to refer to the jurisdiction of the Chancellor's Court, and to consider the reason of its introduction and the effect that the doctrines of equity, which were the outcome of such jurisdiction, had on the law of the land.

Opinions differ as to when the Chancellor's Court, or to give it its other name, the Court of Chancery, was introduced, but it is certain that the jurisdiction of Chancery was in full operation during the reign of Richard II, and that its principal function was to remedy the defects of the common law.[2]

Thenceforward, until the passing of the Judicature Act, 1873, the Court of Chancery continued to expand and develop under the fostering care and skilful treatment of successive Chancellors, and the jurisdiction of the Court was applied, according to necessity, in the mitigation of the extreme rigour of the common law and the interposition of mild and beneficent doctrines suitable to the correction of injustice and the redress of grievances.

Judicature Act, 1873.

With the passing of the Judicature Act, 1873,[3] the present administration of law in England was established and the separate jurisdictions of the Chancery and Common Law Courts were united in the High Court of Justice for the purposes of the concurrent administration of law and equity.[4]

By the same Act it is provided that, when there is any conflict between the rules of Equity and Common Law, the rules of equity are to prevail,[5] and that the High Court has power to grant a mandamus or injunction in all cases where

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[1] (1843) 12 M. & W. at p. 353.

[2] *See* Story's Equity Jurisprudence, 2nd Eng. Ed., §§ 46, 49.

[3] 36 & 37 Vict., c. 66.

[4] *Ibid.*, s. 16.

[5] *Ibid.*, s. 24.

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it appears to the Court just or expedient that such order should be made.[1] The Common Law Procedure Act, 1854,[2] and Lord Cairns' Act, 1858,[3] paved the way for the Judicature Act by respectively giving the Common Law Courts power to issue injunctions and receive equitable defences, and the Chancery Court power to give damages in addition to, or in substitution for, an injunction.

Common Law Procedure Act and Lord Cairns' Act.

The result of these Acts has been to abolish the distinction between law and equity in disputes relating to easements, and to make equity a part of the law.

Prior to these Acts the legal remedy for the disturbance of an easement was either by an action at law for *damages* or a suit in equity for an *injunction*. Under the present procedure, there may be an action in the High Court for either form of relief or for both.

As instances of the effect of equitable doctrines, as regards easements, may be noticed the case of an agreement in England, based on good consideration, being held a good agreement, and as conferring a right of easement without writing, and the introduction of the doctrine of acquiescence in connection with the acquisition of an easement by constructive grant.

Instances of the effect of equitable doctrines.

The earliest definition in English law of the term "Easement" is to be found in an ancient work called Termes de la Ley,[4] where an easement is described to be "a privilege that "one neighbour hath of another, by writing or prescrip- "tion, without profit, as a way or sink through his land, or "such like."

Earliest definition of "Easement."

The word "Easement" itself appears to be of French or Norman origin, and was probably introduced into the Common Law of England at the time when the Norman Jurisprudence began to make itself felt.

Origin of word "Easement."

There is no doubt as to the term "Profit à Prendre" being of French origin.

Origin of word "Profit à Prendre."

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[1] *Ibid.*, s. 25.
[2] 17 & 18 Vict., c. 125.
[3] 21 & 22 Vict., c. 27.
[4] P. 284.

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C. Indian Law.—

Hindu law.

It seems clear that easements were known and recognised by Indian Law, that is to say, Hindu and Mahomedan law. As to Hindu law, "in Halhed's Gentoo Law, p. 162, which is a "translation of a compilation of the ordinances of the pandits, "made under the direction of Warren Hastings, between 1773 "and 1775, it is laid down that 'if a man hath a window in his "'own premises, another person having built a house very "'near to this, and living there with his family hath no power "'to shut up that man's window; and if this second person "'would make a window to his own house, on the side of it, "'that is, towards the other man's house, and that man at the "'time of constructing such window forbids and impedes him, "'he shall not have power to make a window. If the drain of "'a man's house hath, for a long series of years, passed "'through the buildings belonging to another person, that "'person shall not give impediment thereto.' Many other "species of servitudes are referred to in the same book."[1]

In another work, the Vivada Chintamani, various easements are mentioned at pages 124 and 125.[2]

Mahomedan law.

As regards Mahomedan law, reference to the Hedaya, Hamilton's Edition,[3] shews that a right in the nature of an easement is acquired by one who digs a well in waste ground, *viz.* that no one shall dig within a certain distance of it, so as to disturb the supply of water.

Rights to the use of water for the purposes of irrigation are recognised and defined in the same work.[4]

The same work mentions the right to discharge water on the terrace of another,[5] and recognises a claim of servitude.[6]

D. Anglo-Indian Law.—

Prior to the passing of special Acts relating to easements,

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[1] *Per* Norman, J., in *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J. at p. 38.

[2] *Ibid.*

[3] P. 132, and *see* judgment of Norman, J., in *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J. at p. 37.

[4] Pp. 136–155.

[5] At p. 146.

[6] At p. 71.

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the development of the law of Easements in British India was almost invariably accompanied by the application of English principles.

Law of mofussil.

Generally speaking, as regards the mofussil, the rule which has been established by regulations in Bengal [1] and Bombay [2] and recognised by the Indian Courts,[3] that in the absence of any law or well-established custom existing in India, and applicable to the particular case, the principles of justice, equity, and good conscience are to apply, appears to have for its corollary that, where the usages and habits of the people of India admit of it, the English law may well be taken as the measure and standard of such principles.[4] And on this subject it will be useful to quote from the judgment of Peacock, C.J., in the Full Bench case (on appeal from the mofussil) of *Soroop Chunder Hazrah* v. *Troylokho Nath Roy*,[5] in which the English law was applied.

"Justice, equity, and good conscience."

"Now, having to administer equity, justice, and good "conscience, where are we to look for the principles which are "to guide us? We must go to other countries where equity "and justice are administered upon principles which have "been the growth of ages, and see how the Courts act under "similar circumstances; and if we find that the rules which

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[1] Ben. Reg. III of 1793, s. 21; Ben. Reg. VI of 1793, s. 31.

[2] Bom. Reg. IV of 1827, s. 26.

[3] *Bhageeruthea Debea* v. *Greesh Chunder Chowdhry* (1863), 2 Hay at p. 546; *Secretary of State* v. *Administrator-General of Bengal* (1868), 1 B. L. R., O. C. J., 87; *Mithibai* v. *Limji Nowroji Banaji* (1881), I. L. R., 5 Bom., 506; *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1882), I. L. R., 8 Cal. at p. 959; 10 Cal. L. R., 577; *Abdool Hye* v. *Mir Mahomed Mozuffer Hossain* (1883), L. R., 11 Ind. App., 10.

[4] *See Soroop Chunder Hazrah* v. *Troylokho Nath Roy* (1868), 9 W. R., 230; *Molloo March & Co.* v. *The Court of Wards* (1872), L. R., Ind. Appx., Sup. Vol. at p. 100; *Ram Lall Singh* v. *Lill Dhary Mahton* (1878), I. L. R., 3 Cal., 778; *Muthoora Kant Shaw* v. *The Indian General Steam Navigation Co.* (1883), I. L. R., 10 Cal. at p. 189; *Webbe* v. *Lester* (1865), 2 Bom. H. C., 55; *Mithibai* v. *Limji Nowroji Banaji* (1881), I. L. R., 5 Bom., 506; *Chunidal* v. *Manishankar* (1893), I. L. R., 18 Bom., 623; and *see Brojodurlabh Sinha* v. *Ramanath Ghose* (1897), I. L. R., 24 Cal. at p. 930. And in *Culliandoss Kirparam* v. *Cleveland* (1862), 2 Ind. Jur. O. S., 15, it was said that the law of easements in England being derived from the Civil law has no peculiarities debarring its application to British subjects in India.

[5] (1868) 9 W. R., 230, at p. 232.

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"they have laid down are in accordance with the true "principles of equity, we cannot do wrong in following "them."

Law of Presidency-towns.

As regards the Presidency-towns, however, a different rule has been observed under the jurisdiction of the Supreme and High Courts as to the law to be applied.

By virtue of the provisions contained in the Charters constituting these Courts, English law is to be administered in all cases except those relating to inheritance or succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Hindu or Mahomedan is a defendant, in which case the Hindu or Mahomedan law, if any, must be applied.[1]

In conformity with these provisions, High Courts have felt themselves bound to apply the English law in cases of easements arising within their jurisdiction.[2]

General application of English principles in Presidency-towns and mofussil.

And in further testimony to the application of English principles to the subject of easements in India, whether in cases arising in the Presidency-towns or in the mofussil, may be noticed the observation of Mr. Whitley Stokes in the Statement of Objects and Reasons accompanying the introduction of the Easements Bill of 1880,[3] to the effect that the law of England "being just, equitable, and almost free from "local peculiarities, has, in many cases, been held to regulate "the subject in this country."[4]

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[1] *Webbe* v. *Lester* (1865), 2 Bom. H. C. at p. 56; *see* also, as to the extent of English law to be administered, Broughton's Civil Procedure Code, VIII of 1859, 4th Ed., p. 893; and Morley's Digest, Vol. I, p. xxii of the Introduction.

[2] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Bhuban Mohan Banerjee* v. *Elliott* (1870), 6 B. L. R., 85; *Modhoosoodun Dey* v. *Bissonath Dey* (1875), 15 B. L. R., 361.

[3] *Gazette of India*, 1880, Part V, July to Dec., p. 476.

[4] In Bengal, *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Bhuban Mohan Banerjee* v. *Elliott* (1870), 6 B. L. R., 85; *Modhoosoodun Dey* v. *Bissonath Dey* (1875), 15 B. L. R., 361. In Bombay, *Cullian Doss Kirparam* v. *Cleveland* (1862), 2 Ind. Jur., O. S., 16; *Ratanji H. Bottlewalla* v. *Edalji H. Bottlewalla* (1871), 8 Bom. H. C., O. C. J., 181. In the mofussil, *Ponnusawmi Tevar* v. *The Collector of Madura* (1869), 5 Mad. H. C., 6, 23, 24; *Krishna Ayyar* v. *Vencatachella Mudali* (1872), 7 Mad. H. C., 60; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46.

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E. Repealed Indian Enactments relating to Easements.—

Under this head the Acts requiring notice are the Limitation Acts, XIV of 1859, IX of 1871, and XV of 1877. Indian Limitation Acts.

Act XIV of 1859 was repealed by Act IX of 1871, which in turn was repealed by Act XV of 1877, which itself, so far as the definition of "Easements" and sections 26 and 27 are concerned, has been repealed by the Indian Easements Act, V of 1882, as regards the territories to which the latter Act applies.

All these Limitation Acts applied to the whole of British India, and although Act XIV of 1859 contained no provision expressly referring to easements, it is worthy of remark, as a matter of historical interest, that the High Courts of Bengal and Madras, at a time when there was no precise rule in the mofussil as to the period of uninterrupted enjoyment required to establish an easement, shewed an inclination by analogy to section 1, clause 12, of the Act, to adopt twelve years as such period.[1] But the Bombay High Court declined to accept such analogy on the ground that the long-established law of Bombay required a period of twenty years for the establishment of an easement.[2] Act XIV of 1859.

The first Indian Act which expressly recognised Easements was the Limitation Act, IX of 1871. Act IX of 1871.

It contained no interpretation of "Easement" as is found in section 3 of the Limitation Act, XV of 1877, but by section 27 it provided for the acquisition of an easement, whether affirmative or negative, by the enjoyment of such easement, as of right and without interruption, for a period of twenty years. Section 27.

By section 28 of the same Act in computing the said period of twenty years, provision is made for the exclusion, as against the reversioner, of the time for which any easement, other than easements of light and air, was enjoyed on or over Section 28.

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[1] *Joy Prakash Singh* v. *Ameer Ally* (1868), 9 W. R., 91; *Ponnusawmi Tevar* v. *The Collector of Madura* (1869), 5 Mad. H. C. at p. 21.

[2] *Narotam Bapu* v. *Ganpatrav Pandurang* (1871), 8 Bom. H. C. O. C. J., 69.

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his property during the continuance of the interest of his predecessor in title, whether for life or for a period exceeding three years.

And in the second schedule annexed to the Act, Articles 31, 32, 40, and 118 provided for the limitation of suits for the disturbance of easements by the period of two years and six years respectively, and Article 146 provided for the limitation of suits for declaration of rights to easements by the period of twelve years.

Article 31 related to a suit for damages for the obstruction of a way or watercourse, Article 32 to a suit for damages for the diversion of a watercourse, and Article 40 to suits for damages for the disturbance of other easements; whilst Article 118 related to suits for which no period of limitation was provided elsewhere in the schedule.[1]

Act XV of 1877, s. 3.

Act XV of 1877, which repealed Act IX of 1871, introduced into its interpretation clauses in section 3 the following paragraph relating to easements:—

Interpretation of "Easement."

"'Easement' includes also a right, not arising from "contract, by which one person is entitled to remove and "appropriate for his own profit, any part of the soil belonging "to another, or anything growing in, or attached to, or sub-"sisting upon, the land of another."

As already seen, this provision has resulted in the fusion of easements and profits *à prendre*.

Sections 26 and 27.

Further, sections 26 and 27 of Act XV of 1877 contain the same provisions regarding easements as those which were embodied in the corresponding sections 27 and 28 of the Act of 1871, except that section 28 of the latter Act expressly excluded easements of light and air from its operation, and that section 27 of the Act of 1877 applies to *all* easements.[2]

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[1] For the application of this article, *see* Chap. XI, Part III (5).

[2] From the statement of Objects and Reasons in the Indian Limitation Bill of 1877, it appears that the exception as to light and air was struck out of s. 28, because it was thought to complicate the law, and because the reasons which led to the insertion of a like exception in the English Prescriptive Act did not seem to apply to India (*Gazette of India*, Part V, January to June 1877, p. 113).

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The foregoing definition of "Easement" and sections 26 and 27 were repealed by section 3 of the Indian Easements Act in the territories to which it applied.[1]

Articles 36, 37, and 38 of the second schedule correspond with Articles 40, 31, and 32, respectively, of the previous Act, but differ in the respect that Articles 37 and 38 make three years instead of two years the period of limitation.

Further, Article 120 of the Act of 1877 corresponds with Article 118 of the Act of 1871.

Subject to the provisions of section 26 with reference to easements acquired by long enjoyment, Article 120 governs suits for injunction to restrain or remove the disturbance of easements.[2]

In Act XV of 1877 there is no article corresponding with Article 146 of Act IX of 1871. The articles of Act XV of 1877 have not been repealed by the Indian Easements Act, and therefore govern the limitation of suits relating to easements in the whole of British India.[3]

Object of Acts IX of 1871 and XV of 1877. These Acts remedial, not prohibitory or exhaustive.

It has been laid down by the Privy Council that the object of Act IX of 1871 was to facilitate the establishment of rights of easements by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give without more, a title to easements, but that the Act was remedial, and was neither prohibitory nor exhaustive.

Under it a man might acquire a title who had no other right at all, but it did not exclude or interfere with other titles and modes of acquiring easements.[4]

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[1] *I.e.* Madras, Central Provinces, and Coorg; the Indian Easements Act being itself extended by Act VIII of 1891 to Bombay, the North-Western Provinces, and Oudh (now together called the United Provinces), *see infra*, F, and Apps. VII and XI.

[2] *See* Chap. VII, Part II, and Chap. XI, Part III (5), and *Kanakasaba* v. *Mattu* (1890), I. L. R., 13 Mad., 445.

[3] *See* further, Chap. VII, Part II; Chap. XI, Part III, (5).

[4] *Rajrup Koer* v. *Abdul Hossein* (1880), I. L. R., 6 Cal., 394; 7 C. L. R., 529; 7 Ind. App., 240; and *see Modhoosoodun Dey* v. *Bissonath Dey* (1876), 15 B. L. R., 361. *See* further, Chap. VII, Part II.

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This decision has been followed by the Indian Courts with reference to the Act of 1877.[1]

F. Unrepealed Indian Enactments relating to Easements.—It will be convenient to notice these Acts in chronological order.

Act VIII of 1873, s. 8, cls. (*h*) and (*i*), and s. 32, cl. (*b*).

The first unrepealed Indian enactment on this subject is Act VIII of 1873, an Act of the Governor-General in Council entitled "The Northern India Canal and Drainage Act," and applying to the Punjab, North-Western Provinces and Oudh, and the Central Provinces.

Compensation.

By section 8, clause (*h*), it is provided that compensation will be awarded by Government as regards damage done in respect of any right to a watercourse or the use of any water to which any person is entitled under the Indian Limitation Act, 1871, Part IV (with which Part IV of the present Limitation Act, XV of 1877, corresponds).

Clause (*i*) of the same section provides how the amount of such compensation is to be determined.

Compensation when not awarded.

By section 32, clause (*b*), of the same Act no claim is to be made against Government for compensation in respect of loss caused by the failure or stoppage of the water in a canal by reason of any act beyond the control of Government.

Bengal Act, III of 1876, s. 11, cl. (*g*).

The next Act in order of time is an Act of the Bengal Council, Act III of 1876, called "The Bengal Irrigation Act."

Compensation.

By section 11, clause (*g*), of this Act it is provided that compensation may be awarded as regards damage done in respect of any right to a watercourse or the use of any water to which any person is entitled under the Limitation Act of 1871, Part IV.

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[1] *Achul Mahta* v. *Rajun Mahta* (1881), I. L. R., 6 Cal., 812; *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1881), I. L. R., 7 Cal., 132; 8 Cal. L. R., 281; *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1882), I. L. R., 8 Cal., 956; 10 Cal. L. R., 577; *Punja Kuvarji* v. *Bai Kuvar* (1884), I. L. R., 6 Bom., 20; *Srinivasa Rau Saheb* v. *The Secretary of State* (1880), I. L. R., 5 Mad., 226, *Sri Raja Vericherla* v. *Sri Raja Satracherla* (1881), I. L. R., 5 Mad., 253; *Arzan* v. *Rakhal Chunder Chowdhry* (1883), I. L. R., 10 Cal., 214; *Eshan Chandra Samanta* v. *Nil Moni Singh* (1908), I. L. R., 35 Cal., 851; and *see The Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839.

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Then comes the Specific Relief Act, I of 1877, which extends to the whole of British India except the Scheduled Districts as defined in Act XIV of 1874. Sections 52 to 57 deal with the subject of preventive relief by temporary, perpetual, and mandatory injunctions to prevent and remedy the disturbance of easements.

Specific Relief Act, I of 1877.

Preventive Relief.

Section 54 of the same Act recognises the alternative method of relief by damages.

The next Act in order of time is the Indian Limitation Act, XV of 1877, the provisions of which, as relating to easements, have already been referred to.

Limitation Act, XV of 1877.

It will be remembered that this Act has been repealed by the Indian Easements Act only as regards the territories to which the latter Act applies.

It may, therefore, as regards easements, be said to apply to the whole of British India excepting those parts thereof to which the Indian Easements Act applies, that is to say, the Limitation Act, XV of 1877, applies to the whole of British India, except the Provinces of Bombay and Madras, the North-Western Provinces and Oudh, the Central Provinces, and Coorg.

Extent of Act as regards easements.

The next Act dealing with easements is the Transfer of Property Act, IV of 1882, which by section 6, clause (*c*), provides that an easement cannot be transferred apart from the dominant heritage, and by section 8 provides that unless a different intention is expressed or necessarily implied a transfer of property[1] passes forthwith to the transferee the easements annexed thereto.

Transfer of Property Act, IV of 1882, s. 6, cl. (*c*), and s. 8.

Next in order comes the Indian Easements Act, V of 1882, which applied, in the first instance, only to Madras, the Central Provinces, and Coorg, until extended by Act VIII of 1891 to Bombay and the North-Western Provinces and Oudh. It came into force on 1st July 1882.[2]

Indian Easements Act, V of 1882.

The next Act to be noticed in connection with easements is the Criminal Procedure Code, Act X of 1882.

Criminal Procedure Code, Act X of 1882, s. 147.

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[1] *See* further, Chap. VI, Part I, Appendix VIII.

[2] For the history of the Act, *see*

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Section 147 of this Act prescribes the procedure to be followed by Magistrates in cases of dispute concerning easements.[1]

Civil Procedure Code, Act XIV of 1882, ss. 492–497.

Next in order comes the Civil Procedure Code, Act XIV of 1882, of which Act sections 492–497 regulate the subject of temporary injunctions.

Act VIII of 1891.

Then comes Act VIII of 1891, entitled an Act to extend the Indian Easements Act, 1882, to certain areas in which that Act is not in force, whereby the Indian Easements Act was extended to Bombay, the North-Western Provinces, and Oudh.

It may here be mentioned that suits relating to easements instituted in Bombay, the North-Western Provinces, and Oudh after the passing of the Indian Easements Act but before the passing of Act VIII of 1891, have been held not to be governed by the Indian Easements Act.[2]

Land Acquisition Act, I of 1894, s. 3, cl. (*b*).

Lastly comes the Land Acquisition Act, I of 1894, by section 3, clause (*b*), whereof, it is provided that, for the purposes of this Act, a person shall be deemed to be interested in land if he is interested in an easement affecting the land.

Part III.—Present Law in force in British India relating to Easements.

In Part II of this chapter have been noticed generally, as to history and present application, the law, statutory and other, by which the subject of easements is regulated in British India.

Local divisions of the subject.

It may be useful here to summarise that law, as it now exists, in accordance with the local or geographical divisions of the subject.

Bengal.

1. *In Bengal*—

(*a*) The Bengal Irrigation Act, III of 1876, section 11, clause (*g*).

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[1] As to the power of a magistrate under this section, *see Pasupati Nath Bose* v. *Nando Lall Bose* (1900), 5 Cal. W. N., 67; *Nalit Chandra Neogi* v. *Tarini Prosad Gupta* (1901), 5 Cal. W. N., 335.

[2] *Udit Singh* v. *Kashi Ram* (1892), I. L. R., 14 All., 185; *Wutzler* v. *Sharpe* (1893), I. L. R., 15 All., 283; *Chunilal* v. *Manishanker* (1893), I. L. R., 18 Bom., 616.

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(*b*) The Specific Relief Act, I of 1877, sections 52–57.[1]

(*c*) The Indian Limitation Act, XV of 1877, section 3 (interpretation of "easements"), sections 26 and 27, and Articles 36, 37, 38, 120.[2]

(*d*) The Transfer of Property Act, IV of 1882, section 6, clause (*c*), and section 8.

(*e*) Criminal Procedure Code, Act X of 1882, section 147.[3]

(*f*) Civil Procedure Code, Act XIV of 1882, sections 492–497.[4]

(*g*) Land Acquisition Act, I of 1894, section 3, clause (*b*).

In the High Court.

(*h*) In Calcutta (as subject to the Original Civil Jurisdiction of the High Court), the principles of the English Law of Easements as developed out of the doctrines of the common law and equity and resting on judicial authority.

In the mofussil.

(*i*) In the mofussil, *i.e.* Bengal outside the Original Civil Jurisdiction of the High Court, the principles of justice, equity, and good conscience which have been interpreted to mean the English law where the application of such law is suited to the usages and habits of the people.

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[1] Extended under the Scheduled Districts Act to—

(*a*) Western Jalpaiguri (*see Gazette of India*, 16th December 1882, Part I, p. 511).

(*b*) Districts of Hazaribagh, Lohardaga, and Manbhum, and Pargana Dhalbhum in District of Singbhum (*see Gazette of India*, 16th of February 1878, Part I, p. 82).

[2] As regards the Scheduled Districts in Bengal (for which *see* the Scheduled Districts Act, XIV of 1874, First Schedule and App. A) this Act has been declared in force—

(*a*) In the Sonthal Parganas by Reg. III of 1872 as amended by Reg. III of 1886, s. 6.

(*b*) Under the Scheduled Districts Act, in the Districts of Hazaribagh, Lohardaga, and Manbhum, and Pargana Dhalbhum, and in Kolhan in the District of Singbhum (*see Gazette of India*, 22nd October 1881, Part I, p. 504).

[3] Declared in force in the Sonthal Pergunnahs by Reg. III of 1872, s. 3, as amended by Reg. III of 1886, s. 2.

[4] The whole Code (except ss. 1 and 3) has been extended to the Districts of Hazaribagh, Lohardaga and Manbhum, the Pargana of Dhalbhum in the District of Singbhum and the Mahal of Angal (*Gazette of India*, 3rd June 1882, Part I, p. 218.

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2. *In Bombay*—

Bombay.

(*a*) The Specific Relief Act, I of 1877, sections 52–57.[1]

(*b*) The Indian Limitation Act, XV of 1877, Articles 36, 37, 38, 120.

(*c*) The Transfer of Property Act, IV of 1882, section 6, clause (*c*), and section 8.

This Act was extended to the whole of the territories (other than the Scheduled Districts) under the administration of the Government of Bombay from the 1st January 1893.[2]

(*d*) Indian Easements Act, V of 1882. The whole.

This Act was extended to the territories administered by the Governor of Bombay by Act VIII of 1891 which received the assent of the Governor-General in Council on the 6th March 1891.

(*e*) Criminal Procedure Code, Act X of 1882, section 147.

(*f*) Civil Procedure Code, Act XIV of 1882, sections 492–497.

(*g*) Land Acquisition Act, I of 1894, section 3, clause (*b*).

3. *In the North-Western Provinces and Oudh*[3]—

The N.-W. P. and Oudh.

(*a*) The Northern India Canal and Drainage Act, VIII of 1873, section 8, clauses (*h*) and (*i*), and section 32, clause (*b*).

(*b*) Otherwise, the same law as in Bombay, Madras, the Central Provinces, and Coorg, except that the Transfer of Property Act is not in force in the North-Western Provinces and Oudh.[4]

The Indian Easements Act was extended to the North-Western Provinces and Oudh by Act VIII of 1891.

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[1] Extended to Sindh, one of the Scheduled Districts, Bombay (*see Gazette of India*, 4th December 1880, Part I, p. 676).

[2] *See Bombay Government Gazette*, 1892, Part I, p. 1071.

[3] Now known as "The United Provinces."

[4] The whole of the Civil Procedure Code (except ss. 1 and 3) has been extended to Pargana Jaunsar Bawar in the Dehra Dun District and the Scheduled portion of the Mirzapur District (*Gazette of India*, 3rd June 1882, Part I, p. 217).

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4. *In Madras*—

The same law as in Bombay, North-Western Provinces, Oudh, Central Provinces, and Coorg, except that the Indian Easements Act was made applicable to Madras in the first instance, and accordingly came into force there on the 1st July 1882, and that the Transfer of Property Act is not in force in Madras. Madras.

5. *In the Central Provinces and Coorg*—

The same law as in Madras,[1] excepting that the Northern India Canal and Drainage Act, VIII of 1873, section 8, clauses (*h*) and (*i*), and section 32, clause (*b*), applies to the Central Provinces and not to Madras or Coorg, and that the Indian Limitation Act, XV of 1877, is not in force in Coorg. The Central Provinces and Coorg.

6. *In the Punjab*— The Punjab.

(*a*) The Northern India Canal and Drainage Act, VIII of 1873, section 8, clauses (*h*) and (*i*) and section 32, clause (*b*).

(*b*) The Specific Relief Act, I of 1877, sections 52–57.[2]

(*c*) The Indian Limitation Act, XV of 1877, section 3 (interpretation of "Easement"), and sections 26 and 27 and Articles 36, 37, 38, 120.[3]

(*d*) The Criminal Procedure Code, Act X of 1882, section 147.

(*e*) Civil Procedure Code, Act XIV of 1882, sections 492–497.[4]

(*f*) Land Acquisition Act, section 3, clause (*b*).

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[1] The Specific Relief Act I of 1877 has been extended to—

(*a*) The Scheduled Districts of the Central Provinces (*see Gazette of India*, 13th December 1879, Part I, p. 772).

(*b*) Coorg (*see Gazette of India*, 3rd June 1882, Part I, p. 217).

[2] Extended to the Scheduled Districts of the Punjab (*see Gazette of India*, September 22, 1877, Part I, p. 562).

[3] Declared in force in the District of Hazara, one of the Scheduled Districts of the Punjab by Reg. II of 1874, s. 3.

[4] The whole Code except ss. 1 and 3 has been extended to the Scheduled Districts of the Punjab.

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(*g*) The principles of justice, equity, and good conscience had formerly to be applied by the Punjab Chief Court under Act IV of 1866, section 19, in the exercise of its original and appellate jurisdiction. Act IV of 1866 was repealed by Act XVII of 1877, in turn repealed (except as regards section 18) by Act XVIII of 1884. In the last two Acts nothing is said as to the law to be applied, but the Court would no doubt follow the principles of English law in the absence of any Indian law or well-established custom.[1]

7. *In Assam*—

Assam.

Assam being one of the Scheduled Districts, none of the enactments in force in British India apply thereto unless specially declared to be in force, or extended by notification in the *Gazette of India* and the local Gazette (if any).[2]

(*a*) The only Acts relating to easements that, at present, appear to be in force in Assam are the Specific Relief Act, I of 1877, and the Civil Procedure Code, Act XIV of 1882, extended to the Districts of Kamrup, Nowgong, Darrang, Sibsagar, Lakhimpur, Goalpara (excluding the Eastern Duars), Sylhet and Cachar (excluding the North Cachar Hills).[3]

(*b*) Generally speaking, under section 37 of Act XII of 1887,[4] the law to be administered in the Civil Courts of Assam, which are subject to the superintendence of the Calcutta High Court, is, in the absence of any other law, the law of justice, equity, and good conscience.[5]

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[1] *See* Punjab Record, No. 80 of 1876, and *Gazette of India*, July to December 1880, Part V, p. 476.

[2] *See* Scheduled Districts Act, XIV of 1874, ss. 3–5.

[3] *See Gazette of India*, 1877, Part I, p. 662, and *Assam Gazette*, 1877, Part I, p. 383.

[4] The Bengal, N.-W. P. and Assam Civil Courts Act.

[5] *Ibid.*, s. 37 (2).

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8. *In Burma*—

By section 2 of Act XX of 1886, called the Upper Burma Laws Act, Upper Burma and Lower Burma, the latter being then known as British Burma, were constituted one province called Burma. Burma.

By section 4 of the same Act the expression "British Burma" occurring in any enactment in force at the passing of the Act is to be read as "Lower Burma."

When, therefore, in any Act, prior to Act XX of 1886, relating to easements, the expression "British Burma" is found, it must be taken as referring to "Lower Burma."

For present purposes, therefore, it will be convenient to take Lower Burma and Upper Burma separately.

(1) *In Lower Burma*—

Specific Relief Act, I of 1877, sections 52–57.

Indian Limitation Act, XV of 1877, section 3 (interpretation of "Easement"), and sections 26 and 27 and Articles 36, 37, 38, 120. Lower Burma.

Transfer of Property Act, IV of 1882, section 6, clause (*c*), and section 8. This Act, as regards Lower Burma, is in force only in the area included within the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon, and was extended thereto from the 1st January 1893.[1]

Criminal Procedure Code, Act X of 1882, section 147, Land Acquisition Act, I of 1894, section 3, clause (*b*).

(2) *In Upper Burma*—

(*a*) Specific Relief Act, I of 1877, sections 52–57.[2] Upper Burma.

(*b*) Indian Limitation Act, XV of 1877, section 3 (interpretation of "Easement"), and sections 26 and 27 and Articles 36, 37, 38, 120.[3]

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[1] *See Burma Gazette*, 1892, Part I, p. 373.

[2] Extended to Upper Burma (except the Shan States), *see Gazette of India*, 1893, Part II, p. 272, and declared in force in Upper Burma by the Burma Laws Act, XIII of 1898, s. 4 (1), and First Schedule; declared in force in Upper Burma by Act XIII of 1898, s. 4 (1), and First Schedule, repealing Act XX of 1886.

[3] Declared in force in Upper Burma by Act XIII of 1898 (s. 4 (1) and First Schedule), repealing Act XX of 1886.

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(*c*) Criminal Procedure Code, Act X of 1882, section 147.

This Code has, with certain modifications, been extended to Upper Burma (except the Shan States) by Regulation VII of 1886.

(*d*) Civil Procedure Code, sections 492–497.[1]

(*e*) Land Acquisition Act, section 3, clause (*b*).[2]

Generally—By Regulation No. VIII of 1886, providing for the administration of Civil Justice in Upper Burma, section 87, sub-section (2), the Courts, in cases not provided for by sub-section (1) of the same section, which sub-section does not relate to easements, are to act according to justice, equity, and good conscience.

(3) *In Burma generally*—

Burma generally.

Act XIII of 1898, the Burma Laws Act, repealing section 4 of Act XI of 1889, provides as follows, by section 13, which reproduces the repealed section, for the law to be administered by the Courts in Burma, namely :—

"Subject to the provisions of sub-section (1)" (which does not apply to easements), "and of any other enactment for the "time being in force, all questions arising in civil cases insti- "tuted in the Courts of Rangoon shall be dealt with and "determined according to the law for the time being adminis- "tered by the High Court of Judicature at Fort William in "Bengal in the exercise of its ordinary original civil juris- "diction."[3]

"In cases not provided for by sub-section (1) or sub-section "(2), or by any other enactment for the time being in force, "the decision shall be according to justice, equity, and good "conscience."[4]

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[1] *See* Act XIII of 1898, s. 4 (1), and First Schedule, repealing Act XX of 1886.

[2] *Ibid.*

[3] S. 13, sub-section (2). Under Act VI of 1900, the Recorder's Court in Rangoon has ceased to exist, and a Chief Court for Lower Burma has been established.

[4] S. 13, sub-section (3).

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CHAPTER II.

Characteristic Features of Easements.

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Association of easements with dominant and servient tenements.

It has been seen that an easement, while conferring a right on the owner of the dominant tenement, imposes a corresponding burthen on the land which is the subject of the servient tenement, and that, to the extent of such burthen or obligation, there is a curtailment or restriction of the rights of the owner of the servient tenement. Thus, it is one of the essential qualities of an easement that it should be associated with two distinct tenements, or heritages as they are called in the Indian Easements Act, the *Dominant Tenement* to which the right is accessory or appurtenant, and the *Servient Tenement* in, upon, or over which the right is exercised and a corresponding burthen or obligation imposed. If there be no dominant tenement, there can be no easement.[1]

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[1] *Mounsey* v. *Ismay* (1865), 34 L. J. Exch., 52 (56); *Rangeley* v. *The Midland Ry. Co.* (1868), L. R., 3 Ch. App., 306 (310); 37 L. J. Ch., 313 (316); *Hawkins* v. *Rutter* (1891), 61 L. J. Q. B., 146; (1892) 1 Q. B., 668; *Chundee Charn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 Cal. L. R., 269; *Ashruf Ali* v. *Jaga Nath* (1884), I. L. R., 6 All., 497.

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In *Mounsey* v. *Ismay*,[1] Martin, B., states positively that to constitute an easement there must be two tenements, a dominant one to which the right belongs, and a servient one upon which the obligation is imposed.

In *Rangeley* v. *The Midland Railway Co.*, Cairns, L.J., said: "There can be no easement properly so called unless "there be both a servient and dominant tenement."[2]

And in a later case it was said that the word "Easement" implies a dominant tenement in respect of which the easement is claimed, and a servient tenement over which it is claimed in respect of the dominant tenement.[3]

So, too, in the case of a *profit à prendre* there must be a dominant and servient tenement. A profit wholly unconnected with the enjoyment of the right of property in the dominant tenement cannot be claimed as appurtenant to the dominant tenement.[4]

Definitions in Indian Easements Act, s. 4.

The following definition of *Dominant* and *Servient Heritage* is given in section 4 of the Indian Easements Act,[5] namely:—

"The land for the beneficial enjoyment of which the right "exists is called the dominant heritage, and the owner or "occupier thereof the dominant owner; the land on which "the liability is imposed is called the servient heritage, and "the owner or occupier thereof the servient owner."

Thus, where the owner of a house has, for the beneficial enjoyment thereof, a right of way over his neighbour's land, the house is the dominant heritage or tenement, and the neighbour's land is the servient heritage or tenement.

Restrictive character of Easements.

Indian Easements Act, s. 7.

Section 7 of the Indian Easements Act defines and illustrates the rights which are capable of restriction through the operation of easements.

The section runs as follows:—

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[1] *Ubi sup.*

[2] *Ubi sup.*

[3] *Hawkins* v. *Rutter* (1891), 61 L. J. Q. B., 146.

[4] *Bailey* v. *Stephens* (1862), 12 C. B. N. S., 91; 31 L. J. C. P., 226; *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. N. S., 687 (709); 34 L. J. C. P., 309 (311).

[5] *See* App. VII.

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"Easements are restrictions of one or other of the following "rights (namely) :—

"(*a*) The exclusive right of every owner of immoveable "property (subject to any law for the time being "in force) to enjoy and dispose of the same "and all the products thereof and accessions "thereto."

"(*b*) The right of every owner of immoveable property "(subject to any law for the time being in force) "to enjoy without disturbance by another the "natural advantages arising from its situation."

Clause (*a*) deals with the exclusive right of property, and is illustrated by Illustration (*a*).

Clause (*b*) deals with a class of rights known as "*Natural Rights.*"[1]

Illustrations (*b*) to (*j*) provide instances of Natural Rights.

These rights are regarded by law as the ordinary incidents of property, and are duly protected.

But interference with these rights is not unlawful if it is founded on a right of easement which will, to a given extent, curtail or restrict such natural rights.

Illustration (*h*) to section 7 contemplates the case of a natural right being restricted by an easement known to the Civil Law as the *Servitus aquæ ducendæ*, that is to say, the right of diverting water which in its natural course would flow over or along the land of a riparian owner and of conveying it to the land of the party diverting it, that is, the dominant owner.

The restrictive nature of such an easement is shewn by the curtailment of the rights of the owner of the servient tenement. It subjects him to disadvantage by taking from him the use of the water for the watering of his cattle, the irrigation of his land, the turning of his mill, or other beneficial use to which water may be applied.[2]

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[1] As to these rights, *see* Chap. I, Part I, and Chap. V.

[2] *Per* Cockburn, C.J., in *Mason* v. *Shrewsbury and Hereford Ry. Co.* (1871), L. R., 6 Q. B., 578 (587) ; 40 L. J. Q. B., 293 (297).

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Easement cannot be dissociated from dominant tenement.

An easement cannot be dissociated from the dominant tenement. There cannot be an easement in gross.[1]

Thus a way appendant to a house or land cannot be granted away or made in gross; for no one can have such a way, but he who has the land to which it is appendant.[2]

This is a fundamental principle of the English law of easements and has been recognised in India by section 6, clause (*c*), of the Transfer of Property Act, which provides that an easement cannot be transferred apart from the dominant heritage.[3]

Dominant and servient tenement must belong to different persons.

It is further essential to the existence of an easement that the dominant and servient tenement should be in the ownership or possession of distinct persons.[4] It is apparent that since an easement implies a right to be enjoyed on the one side and an obligation to be borne on the other, the union of the right and the obligation in the absolute ownership or possession of the same person deprives the easement of its distinctive character and converts it into an ordinary right of property.[5] "For none can have land and also an easement over it."[6]

Easement must be beneficial to dominant tenement.

Another characteristic and essential feature of an easement is that it must be beneficial to the dominant tenement. In the leading case of *Ackroyd* v. *Smith*,[7] it was said that a right unconnected with the enjoyment or occupation of land, cannot be annexed as an incident to it.[8]

The words "beneficial enjoyment of the land" contained

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[1] *See* Chap. I, Part I.

[2] *Ackroyd* v. *Smith* (1850), 10 C. B., 164; 19 L. J. C. P., 315.

[3] *See* App. VI.

[4] *Obhoy Churn Dutt* v. *Nobin Chunder Dutt* (1868), 10 W. R., 298; *Sham Churn Auddy* v. *Tariny Churn Banerjee* (1876), I. L. R., 1 Cal., 422 (428); *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 51; and *see* Gale on Easements, 8th Ed., pp. 17, 18.

[5] As to the difference in the effect respectively produced on an easement by unity of absolute ownership and unity of possession, *see* Chap. IX, Part II, A, and Chap. X, Part II.

[6] *Ladyman* v. *Grave* (1871), L. R., 6 Ch. App. at p. 767.

[7] *Ubi sup.*

[8] *See* also *Bailey* v. *Stephens* (1862), 12 C. B. N. S., 91; 31 L. J. C. P., 226; *Ellis* v. *The Mayor of Bridgworth* (1863), 15 C. B. N. S., 52; *Hill* v. *Tupper* (1863), 2 H. & C., 121; 33 L. J. Exch., 217; *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. N. S., 687; 34 L. J. C. P., 309.

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in section 4 of the Indian Easements Act shew that the same principle is there recognised.

Easement conferring benefit on tenements other than dominant tenement, not invalid.

It is no objection to the validity of an easement that in its exercise for the benefit of the dominant estate it confers some benefit upon other tenements.

It may frequently happen that the owner of an ancient light, by virtue of the obligation resting on his opposite neighbour not to build on his land so as to obstruct such ancient light, not only gains protection for others of his windows which are modern, but similarly benefits his next-door neighbour who has no right.

And the owners of lands who, for their protection, possess the right to open the gates of sluices or locks belonging to other persons in time of flood or likelihood of flood may thereby confer benefit on the lands of other persons.

Such easements are none the less good because they confer such additional benefit.[1]

Exercise of easement creates no right in favour of servient owner.

It is a fundamental principle that an easement exists for the benefit of the dominant tenement alone, and that the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment.[2]

Mason v. Shrewsbury and Hereford Ry. Co.

In *Mason* v. *The Shrewsbury and Hereford Railway Co.*,[3] Cockburn, C.J., gives a lucid exposition of this principle.

The plaintiff in that case, as the servient owner of lands from which the water had been diverted by the exercise of an easement which had existed in the defendants but had ceased to exist through powers conferred on them by Act of Parliament, sued the defendants to recover damages for injuries caused to his lands by reason of the abandonment of the easement.

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[1] *Tapling* v. *Jones* (1865), 11 H. L. C., 290; *Simpson* v. *Godmanchester Corporation* (1897), App. Cas., 696.

[2] *Mason* v. *The Shrewsbury and Hereford Ry. Co.* (1871), L. R., 6 Q. B., 578; 40 L. J. Q. B., 293; and *see* I. E. Act, s. 50.

[3] *Ubi sup.*

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Cockburn, C.J., in giving judgment for the defendants, delivered the following statement of the law[1]:—

"The right of diverting water which in its natural course "would flow over or along the land of a riparian owner, and "of conveying it to the land of the party diverting it, the "*servitus aquæ ducendæ* of the civilians, is an easement well "known to the law of England as of every other country. "Ordinarily such an easement can be created, according to "the law of England, only by grant, or by long continued "enjoyment, from which the existence of a former grant may "be reasonably presumed."

"But such a right may, like any other right, be created in "derogation of a prior right by the action of the Legislature. "It was thus created in the present instance. But however it "may be called into existence, the right is essentially the "same. The legal incidents connected with it are the same, "whether the easement is created by grant or by statutory "easement."

"Now it is of the essence of such an easement that it "exists for the benefit of the dominant tenement alone. "Being in its very nature a right created for the benefit of "the dominant owner, its exercise by him cannot operate to "create a new right for the benefit of the servient owner. "Like any other right its exercise may be discontinued, if it "becomes onerous or ceases to be beneficial, to the party "entitled."

"An easement like the present, while it subjects the "owner of the servient tenement to disadvantage by taking "from him the use of the water for the watering of his cattle, "the irrigation of his land, the turning of his mill, or other "beneficial use to which water may be applied, may, on the "other hand, no doubt, be attended incidentally with equal or "greater advantage to him, as, for instance, by rendering him "safe from the danger of inundation. But this will give him "no right to insist on the exercise of the easement on the

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[1] L. R., 6 Q. B. at p. 586; 40 L. J. Q. B. at p. 297.

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"part of the dominant owner, if the latter finds it expedient "to abandon his right."

"In like manner where the easement consists in the right "to discharge water over the land of another, though the "water may be advantageous to the servient tenement, the "owner of the latter cannot acquire a right to have it dis- "charged on to his land, if the dominant owner chooses to "send the water elsewhere or apply it to another purpose. . . . "I am far from saying that the grant of an easement might "not be accompanied by stipulations on the part of the "grantor; as, for instance, that the easement should not be "discontinued without his consent, or that on its discontinu- "ance certain things should be done. I am far from saying "that such a stipulation would not give a right of action. "My observations are intended to apply to a case in which "nothing appears beyond the existence of an easement. In "such a case, it appears to me beyond doubt that the servient "owner acquires no right to the continuance of an easement "and the incidental advantages arising to him from it, if the "dominant owner thinks proper to abandon it."

The same principle was applied in India in a case where the defendant, who owned an easement consisting of the right to discharge over the plaintiff's land surplus water collected by the defendant for irrigation, discontinued the easement by diverting the surplus water.[1]

To the same effect is the provision contained in the first portion of section 50 of the Indian Easements Act.[2]

Easement attaches to soil of servient tenement.

It is one of the qualities of an easement that it should attach itself to the soil of the servient tenement. In imposing itself thereon it lays a negative obligation upon the servient owner, not to do anything which may interfere with the enjoyment of the dominant owner.[3] But the obligation is not a general obligation, but a special obligation of well-defined limits. For instance, an easement of way does not impose

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[1] *Khoorshed Hossein* v. *Teknarain Singh* (1878), 2 Cal. L. R., 141.

[2] *See* App. VII.

[3] Gale, 8th Ed., p. 9. And *see* definitions of easement in Chap. I, and I. E. Act, s. 4.

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upon the servient owner a general obligation to allow the dominant owner to walk wherever he pleases, but the passive obligation that he shall not interfere with "a special specific way" so as to affect the enjoyment of the dominant owner.[1]

Easement, a fractional right.

In order to appreciate the true character of an easement, and the definitions founded thereon, it is important to remember that an easement "is a *fractional* right; that is to "say, a definite right of user subtracted or broken off from "the indefinite right of user which resides in him or them "who bear the dominion of the subject."[2]

For the same reason an easement has been called "a "single or particular exception, accruing to the benefit of the "party in whom the right resides, from the power of user and "exclusion which resides in the owner of the thing."[3]

So again, rights of easement are called by French writers, "*démembremens* du droit de propriété"; that is to say, "detached "bits or fractions of the indefinite right of user which resides "in him or them who own the subject of the servitude."[4]

It is this fractional aspect of an easement which explains the rule that there can be no such thing in law as an easement which destroys the ordinary uses of property by the owner of the land affected.[5]

Easement a right *in rem*.

Moreover, an easement is not a right *in personam*, which is a right arising out of personal obligations and enforceable only against a particular individual or individuals, but belongs to

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[1] *See Taylor* v. *Whitehead* (1781), 2 Dougl., 745; *Doorga Churn Dhur* v. *Kally Coomer Sen* (1881), I. L. R., 7 Cal., 146.

[2] Austin, Juris., 3rd Ed., Vol. II, p. 832.

[3] *Ibid.*

[4] *Ibid.*

[5] *Dyce* v. *Lady James Hay* (1852), 1 Macq. Sc. App., 305, disallowing a claim of public recreation at all times upon an inclosed portion of the appellant's property; *Moonshee Zumeer Ali* v. *Mussamut Doorgahun* (1864), 1 W. R., 230, rejecting the plaintiff's claim to flood the defendant's land with water; *Gooroo Churn Goon* v. *Gunga Gobind Chatterjee* (1867), 8 W. R., 268, forbidding the straying of cows over another's land, thereby rendering its cultivation impossible; *Joy Doorga Dassia* v. *Juggernath Roy* (1871), 15 W. R., 295, forbidding the promiscuous driving of cattle over the whole of another's land; *Doorga Churn Dhur* v. *Kally Coomar Sen* (1881), I. L. R., 7 Cal., 145, forbidding the passage of boats in every direction over the defendant's water.

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the category of rights *in rem* or rights enforceable against all the world; that is, against any one who infringes the right whether he be servient owner or occupier, licensee or trespasser.

And a consideration of the nature of an easement will make this clear. If a man, for the advantage of his own land, has the right to walk across his neighbour's field, or divert the water of his neighbour's stream, he has the accompanying right that no one shall interfere with his easement whether the same arose out of contract or otherwise.

If this were not so, no easement would be secure.

For though an easement is not a right of property, it is a right appurtenant to property and is no less a right *in rem*.

Easement an incorporeal right.

An easement is an incorporeal right exercised in, or over, corporeal property for the beneficial enjoyment of other corporeal property.[1]

"Corporeal things are tangible objects, as land or gold; "incorporeal things are those which are intangible, such as "legal relations and rights, including legal obligations and "rights of action."[2]

Following this definition an easement is an *incorporeal* thing, whereas the land upon which the easement is imposed is a *corporeal* thing.

And in *Clifford* v. *Hoare*,[3] Brett, J., observed that the privilege of walking over another man's land is an easement, but the right to the soil of the road would not be an easement, but a corporeal right.

Easement not an interest in land.

Excluding for the moment the extended meaning given to an easement by the Indian Limitation Act and Indian Easement Act,[4] and confining the right within the limits of the English definition, it is apparent that an easement is not an

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[1] *Kristna Ayyar* v. *Vencatachella Mudali* (1872), 7 Mad. H. C., 60; *Hewlins* v. *Shippam* (1826), 5 B. & C., 221; 7 D. & R., 783; *Clifford* v. *Hoare* (1874), L. R., 9 C. P., 362; 43 L. J. C. P., 225.

[2] Williams on "Real Property," 19th Ed., p. 4.

[3] *Ubi sup.*

[4] By including a profit à prendre in an easement. *See* Chap. I, Part I.

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interest in land,[1] but a mere privilege appurtenant to the dominant tenement and imposing upon the servient owner an obligation to suffer something to be done or not to do something in or upon the servient tenement.

This view of the real nature of an easement is not affected by section 3, clause (*b*), of the Land Acquisition Act (I of 1894), which provides that if a person is interested in an easement, he is to be deemed to be interested in land, such a provision applying merely to the purposes of the Act itself.

Easement a restrictive, not exclusive right.

Lastly, it should be observed that the effect of an easement being to restrict, not to extinguish, the ordinary uses of property, a right which operates in the latter manner is not an easement but a right to the land or soil itself.[2]

Thus the right to take all the minerals under a man's land is not an easement but a right to the soil itself.[3]

Conversely, the *exclusive* use of land cannot be demised as appurtenant to other land, for this would be to demise one piece of land as appurtenant to another, which in law cannot be.[4] But the use and enjoyment of land can be demised as an easement or privilege, so long as the restrictive character of the right is not enlarged beyond its legal limits.[5]

Easement definite and limited.

And the operation of an easement is defined as well as limited. "By *servitus* or *easement* is meant any such right "*in rem* as gives to the party in whom it resides a power of "using the subject which is definite as well as limited. The "power of using the subject (like that which is imported by "the right of property) is limited by the sum of the duties "which are incumbent on the party. But, unlike the power "of user which is imported by the right of property, it is not "*merely* circumscribed by the sum of his duties. The uses "which he may derive from the subject, or the purposes to

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[1] *Godley* v. *Frith* (1610), Yelv., 159; *Webb* v. *Paternoster* (1620), Palmer, 71; *Parker* v. *Staniland* (1809), 11 East, 362; *Hewlins* v. *Shippam* (1826), 5 B. & C., 221; *Jones* v. *Flint* (1839), 10 A. & E., 753; *McManus* v. *Cooke* (1887), 35 Ch. Div., 681.

[2] *Dyce* v. *Lady James Hay*, 1 Macq., Sc. App., 305.

[3] *Willkinson* v. *Proud* (1843), 11 M. W., 33; and *see Clifford* v. *Hoare* (1874), 43 L. J. C. P., 225; L. R., 9 C. P., 362.

[4] *Buszard* v. *Capel* (1828), 8 B. & C., 141.

[5] *Dyce* v. *Lady James Hay*, *ubi sup.*

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"which he may apply it, are defined positively, or are "susceptible of positive description. In short, the difference "between property (in any of its modes) and of *servitus* "(whatever be its class) would seem to be this: The party "invested with a right of *servitus*, may turn or apply the "subject to a *given* purpose or purposes. The party invested "with a right of property, may turn or apply the subject to *all* "purposes whatsoever, *save* such purposes as are not consistent "with any of his duties, relative or absolute." [1]

This essential difference between the ownership of land and a right of easement over it prevents a simultaneous claim to both in respect of the same land as inconsistent.[2]

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[1] Austin, Juris., 3rd Ed., Vol. II, p. 831.

[2] *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (1907), I. L. R., 34 Cal., 51; XI Cal. W. N. 20. But there would be no objection to an alternative claim and the establishment of either right provided the other were abandoned, *Ibid.*, overruling *Bijoy Keshub Roy* v. *Obhoy Churn Ghose* (1871), 16 W. R., 198.

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Part I.—Easements of Light and Air.

Nature of such rights.

THE right to light and air may be either a natural right forming one of the incidents of property or it may be an easement.

The extent of the *Natural Right* which is the right of every owner of land to so much light and air as come vertically thereto will be considered hereafter.[1] The *easement* of light and air which, it will be remembered, is a continuous easement,[2] comprises a very important branch of the law of Easements and presents features of special interest in its nature and origin.

Starting with the proposition that the owner of land can take and use for his own property as much light and air as come within the boundaries of his land,[3] it is apparent that the quantity of light and air available for his use is in a large measure dependent upon the acts of his neighbour.

Supposing, then, that his neighbour should in the free enjoyment of his own property erect buildings thereon in such manner as to diminish the flow of light and air on to the other's land, the latter would have no redress unless he could show a right on his part precluding his neighbour from erecting such buildings. Such a right, if it existed, would clearly be restrictive of the other's right to enjoy his property as he pleased, and could only arise as an easement.[4]

Strictly speaking, therefore, an easement of light and air, whether arising under an implied covenant derived from user or under an express or implied covenant or agreement as distinguished from user, is the purely legal right that the servient owner shall not by any act on the servient tenement diminish the quantity of light and air to which the dominant owner is entitled.[5]

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[1] *See* Chap. V, Part II.

[2] *See* Chap. I, Part I, and I. E. Act, s. 5, App. VII.

[3] *Bryant* v. *Lefever* (1879), 4 C. P. D., 172; *Chastey* v. *Ackland* (1895), 2 Ch., 389.

[4] *See* Indian Easements Act, s. 7 and ill. (*a*) to the section, App. VII, and *Sarubai* v. *Bapu* (1878), I. L. R., 2 Bom., 660; *Chastey* v. *Ackland* (1895), 2 Ch. at p. 402.

[5] *See Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179; *Anath Nath Deb* v. *Galstaun* (1908), I. L. R.,

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In this view the easement falls within the definition of a negative easement,[1] and is, in effect, the right to restrict a neighbour in his proprietary right of building, being analogous to what, in Roman law, was a negative servitude, *ne facias* burthening the servient tenement with a prohibition against any interference by the servient owner with the enjoyment of the right.[2]

Known to Hindu and Mahomedan law and recognised by the ancient common law of England.

Easements of light and air are known to the Mahomedan and Hindu law and have been recognised from the earliest times by the ancient common law of England. Cases in the year books in Michaelmas Term 7th Edward III, and Michaelmas Term 14th Henry IV, fol. 25, shew that if a man had an ancient house with windows overlooking the land of his neighbour, through which light and air had been received from a time from which the memory of man ran not to the contrary, he had a good cause of action against any person obstructing the flow of such light and air.

In the Third Institute it is declared that "the common law "prohibits the building of any edifice to a common nuisance "or to the nuisance of any man in his house as to the stopping "up of his light, or to any other prejudice or annoyance of him."

And in *Aldred's case*,[3] it was resolved that "in a house "four things are desired,—the habitation of man, the pleasure "of the inhabitant, the light, and wholesome air, and for "nuisance done to the habitation of a man, for that is the "principal end of a house, an action lies, and so for the "hindrance of light and air for both are necessary."

Arise under an implied covenant.

Though the acquisition of these rights in British India by enjoyment for a period of twenty years falls within the provisions of the Indian Limitation Act and Indian Easements Act,[4]

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35 Cal., 661; 12 Cal. W. N. 519. That is, the right of the owner of the dominant tenant is a right to the reception of light and air in a lateral direction; *Anath Nath Deb* v. *Galstaun*, *ubi sup.*

[1] *See supra*, Chap. I, Part I; Gale on Easements, 8th Ed., p. 315, note (*d*), and *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at p. 185.

[2] *Smith* v. *Kenrick* (1849), 7 C. B., 515 (566); *Angus* v. *Dalton* (1878), 4 Q. B. D., at p. 196; Gale, *ubi sup.*; and *see Colls* v. *Home and Colonial Stores, Ltd.*, *ubi sup.* at p. 186.

[3] (1738) 9 Rep., 57*b*.

[4] *See* Chap. VII, Parts II & III.

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yet, if, as may be the case, these rights were to arise independently of those two Acts,[1] similar considerations would present themselves as to the manner of their origin, as under the English common law prior to the English Prescription Act, which has no force in British India.[2]

Under the English common law the right to the uninterrupted flow of light and air through a definite aperture or channel has been said to arise by virtue of an implied covenant on the part of the servient owner, derived from user, whereby he was deemed to have precluded himself from thenceforth interfering with the access of light and air to the dominant tenement to the extent of such user.[3]

Moore v. *Rawson*.

In *Moore* v. *Rawson*, Littledale, J., in discussing this origin of the right to light and air, pointed out the distinction between the mode of acquiring a right of way and the mode of acquiring an easement of light and air.[4]

A right of way, he declared, apart from any express or implied grant, could arise by prescription or the presumption of a lost grant founded on user for a particular period of time accompanied with the consent, express or implied, of the owner of the land, whereas a right to light and air was acquired by mere occupancy under an implied covenant by the servient owner not to interrupt the free use of light and air. The judgment contains the following instructive passage[5]:

"Every man on his own land has a right to all the light and "air which will come to him, and he may erect even on the "extremity of his land buildings with as many windows as he "pleases. In order to make it lawful for him to appropriate "to himself the use of the light he does not require any "consent from the owner of the adjoining land. He, therefore,

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[1] *See* Chap. I, Part II, E, and Chap. VII, Part II.

[2] *See Elliott* v. *Bhuban Mohan Bannerjee* (1873), 12 B. L. R., 406; Ind. App., Supp. Vol., 175.

[3] *Moore* v. *Rawson* (1824), 3 B. & C., 332; 27 R. R., 375; *Hall* v. *Lichfield Brewery Co.* (1880), 49 L. J. Ch., 655; 43 L. T., 380; *Dalton* v. *Angus* (1881), 6 App. Cas., pp. 776, 782; *Scott* v. *Pape* (1886), 3 Ch. D., 554.

[4] (1824) 3 B. & C. at p. 339; 27 R. R. at p. 381.

[5] 3 B. & C. at p. 340; 27 R. R. at p. 382.

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"begins to acquire the right to the enjoyment of the light "by mere occupancy. After he has erected the building the "owner of the adjoining land may, afterwards, within twenty "years, build upon his own land, and so obstruct the light "which would otherwise pass to the building of his neighbour. "But if the light be suffered to pass without interruption "during that period to the building so erected, the law implies "from the non-obstruction of the light for that length of time, "that the owner of the adjoining land has consented that the "person who has erected the building upon his land shall "continue to enjoy the light without obstruction, so long as he "shall continue the specific mode of enjoyment which he had "been used to have during that period. It does not, indeed, "imply that the consent is given by way of grant, for although "a right of common (except as to common appendant) or a right "of way being a privilege of something positive to be done or "used in the soil of another man's land, may be the subject of "legal grant, yet light and air, not being to be used in the soil "of the land of another, are not the subject of actual grant; "but the right to insist upon the non-obstruction and non-"interruption of them more properly arises by covenant which "the law would imply not to interrupt the free use of the light "and air." [1]

Pranjivandas v. Meyaram.

In India, the principle, thus clearly stated, was applied by the Bombay High Court in the case of *Pranjivandas* v. *Meyaram*,[2] and in Bengal the opinion of Littledale, J., as to the nature of the right to light and the manner of its

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[1] This opinion was noticed with approval by Wightman, J., in *Webb* v. *Bird* (1861), 13 C. B. N. S. at p. 843; by Brett, L.J., in *Angus* v. *Dalton* (1878), 4 Q. B. D. at p. 196; by Pollock, B., in *Dalton* v. *Angus* (1881), 6 App. Cas. at pp. 749, 750; by Field, J., *Ibid.*, pp. 756, 757; by Fry, J., *Ibid.*, pp. 771, 776, and *see* Lord Selborne's observations on the *dictum*, *Ibid.*, p. 794. *See* also *Greenhalgh* v. *Brindlay* (1901), 2 Ch., 324. The right of the adjoining owner to obstruct the light within the prescriptive period can be exercised equally by a Railway Company, *Bonner* v. *Great Western Ry. Co.* (1883), 24 Ch D., 1; *Foster* v. *London, Chatham, and Dover Ry. Co.* (1895), 1 Q. B., 711; or by a public body in whom the adjoining land is vested for a purpose not inconsistent therewith, *Paddington Corporation* v. *Att.-Genl.* (1906), App. Cas., 1.

[2] (1862) 1 Bom. H. C. C. C. J. at p. 151.

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acquisition was adopted by Norman, J., in the case of *Bagram* v. *Khettranath Karformah*.[1]

Bagram v. *Khettranath Karformah.*

The same view was taken by Fry, J., in *Hall* v. *Lichfield Brewery Co.*[2]

Hall v. *Lichfield Brewery Co.*

That learned judge thought the right to have air coming to a window was not the subject of prescription because prescription was the implication of a grant, and such a right was not one which could be claimed by grant, and he agreed with the opinion expressed by Littledale, J., in *Moore* v. *Rawson*,[3] that the right should be put upon an implied covenant not to interrupt the free access of air.

On the reasoning of *Moore* v. *Rawson*[4] and *Hall* v. *Lichfield Brewery Co.*[5] an implied covenant derived from user of the dominant tenement for the period and in the manner required by law, would appear to be the only logical ground upon which the origin of the negative easement of light and air can theoretically be based, for the obligation imposed on the servient tenement, being merely an obligation *ne facias*, cannot strictly form the subject of a *grant*, whether express or implied, by the servient owner to the dominant owner.[6]

But though theoretically inaccurate, it is now the practice to treat easements of light and air as rights which can be acquired by prescription,[7] and to speak of them in that connection as prescriptive rights, in which character they will presently be considered.

Independently of an express grant[8] or covenant,[9] the

Apart from express

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[1] (1869) 3 B. L. R., O. C. J. at p. 43.

[2] (1880) 49 L. J. Ch., 655; 43 L. T., 380.

[3] *Ubi sup.*

[4] *Ubi sup.*

[5] *Ubi sup.*

[6] In considering the principle of an implied covenant derived from user, as applying to the case of easements of light and air the distinction between affirmative and negative easements is important. This distinction was not referred to in *Moore* v. *Rawson* and *Hall* v. *Lichfield Brewery Co.*, *see* Gale, 7th Ed., 288.

[7] *See Cable* v. *Bryant* (1908), 1 Ch., 259.

[8] Although, as has been seen, the idea of a *grant* is foreign to the theory of the acquisition of the easements of light and air by long enjoyment, yet in a conveyance or demise of the dominant tenement the easements can in practice be made to pass by apt words of grant, *see Key* v. *Elph*, Conv. Prec., 8th Ed., Vol. I, 422, 683, 709.

[9] As to the form of covenant, *Ibid.*, 728, 734.

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grant or covenant, definite aperture essential to acquisition of Easements of light and air.

acquisition of easements of light and air depends, as to light, on its enjoyment through a definite window or aperture on the dominant tenement capable of admitting light thereto, and, as to air, on its enjoyment through such definite window or aperture, or through a definite channel on adjoining property.[1]

It will be convenient to consider the authorities in some of which the easements have been separately treated.

Roberts v. *Macord.*

In *Roberts* v. *Macord*,[2] the defendant sought to justify a trespass for breaking down the plaintiff's wall by pleading a right to light and air in respect of an open space of ground at the side of his timber yard for the drying of the timber and the more convenient use of the timber yard and a saw-pit. Patteson, J., said the plea was a very novel one and one which could not be supported in law. If such a plea could be sustained it would follow that a man might acquire an exclusive right to light and air, not only as theretofore in respect of buildings, but merely by reason of having been in the habit of laying a few boards on his ground to dry. Such a rule would be very inconvenient and very unjust.

Potts v. *Smith.*

In *Potts* v. *Smith*,[3] a similar opinion was expressed by Malins, V.C., who pointed out that if a right to light and air were once admitted with regard to open land, the consequence would be that no man could ever build to the edge of his own land, because the owner of the next land might say: "It is very true I have never used this land for building purposes, but I have been in the habit of laying out linen or "timber to dry there, and if you build a house next to it, I can "no longer use it for the same purpose." Such a restriction, he said, would be highly inconvenient and contrary to the rule of law.

Apertures should be permanent as well as definite.

And the apertures through which the light and air have passed into the dominant tenement must be permanent as well as definite, and intended for the access of light and air.[4]

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[1] *See* the authorities considered *infra*.

[2] (1832) 1 M. & R., 230.

[3] (1868) L. R., 6 Eq., 311.

[4] *See Bottlewalla* v. *Bottlewalla* (1871), 8 Bomf. H. C. (O.C. J.) at p. 190. In India a doorway may be as effective for the admission of light and air as a window, *Ibid*.

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In *Webb* v. *Bird*,[1] the plaintiff claimed to be entitled to the free and uninterrupted passage of the currents of wind and air over the defendant's land to his mill. *Webb* v. *Bird*.

It was decided that the right claimed was too indefinite to be the subject of an easement. Willes, J., said: "That which "is claimed here amounts to neither more nor less than this "—that a person having a piece of ground, and building a "windmill upon it, acquires by twenty years' enjoyment a "right to prevent the proprietors of all the surrounding land "from building upon it, if by so doing the free access of the "wind from any quarter should be impeded or obstructed. It "is impossible to see how the adjoining owners could prevent "the acquisition of such a right except by combining together "to build a circular wall round the mill within twenty years."[2]

In *Bryant* v. *Lefever*,[3] the plaintiff's and the defendants' houses adjoined each other. The plaintiff complained that the defendants had raised their house in such a manner as to prevent the free access of air to the plaintiff's chimneys theretofore enjoyed for more than twenty years and to cause them to smoke. It was held that no action was maintainable by the plaintiff against the defendants, for the access of air to the chimneys of a building could not as against the occupier of neighbouring land be claimed as an easement capable of acquisition otherwise than, possibly, by an express grant or covenant. It was thought that the right claimed was too vague and uncertain to be capable of acquisition against the adjoining owner, and that the plaintiff's remedy was to build higher. *Bryant* v. *Lefever*.

In *Harris* v. *De Pinna*,[4] the plaintiff had erected certain timber stages or structures for storing and seasoning timber which were left open on the sides abutting on the defendant's premises for the purpose of admitting light and air, and the defendant having erected buildings on his land up to the boundary of the plaintiff's premises, the plaintiff sued to *Harris* v. *De Pinna*.

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[1] (1861) 10 C. B. N. S., 268; (1863) 13 C. B. N. S., 841.

[2] 10 C. B. N. S. at p. 284.

[3] (1879), 4 C. P. D., 172.

[4] (1886) 33 Ch. D., 238.

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restrain him from interfering with the access of light and air to such timber stages. The suit failed as to light on the ground that the plaintiff had not given evidence of the continuous enjoyment of any definite amount of light in respect of any of the apertures to the said timber stages, and as to air, on the authority of *Webb* v. *Bird*,[1] because its access was not confined within a definite channel over the servient tenement.

Bowen, L.J., said: "Then we come to the air. It seems to "me that the only claim for air which could be supported here "is a claim to the passage of defined air over the premises of "the defendant until it reaches the plaintiff's property. It "would be just like an amenity of prospect, a subject-matter "which is incapable of definition. So the passage of undefined "air gives rise to no rights and can give rise to no rights for "the best of all reasons, the reason of common sense, because "you cannot acquire any rights against others by a user which "they cannot interrupt."[2]

In the same case, Cotton, L.J., treats the two elements as distinct in the manner in which they arrive at the dominant tenement, and points out that light, unlike air, goes over a very short space of the neighbouring land over which it is thrown.[3]

Observations in *Dalton* v. *Angus*.

In this respect, the observations of Lord Blackburn in *Dalton* v. *Angus*[4] in connection with the analogous question of a right of prospect are important. He says; "I think "this decision,[5] that a right of prospect is not acquired by "prescription, shews that whilst on the balance of con- "venience and inconvenience, it was held expedient that the "right to light, which could only impose a burthen upon land "very near the house, should be protected when it had been "long enjoyed, on the same ground it was held expedient that "the right of prospect, which would impose a burthen on a

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[1] *Ubi sup.*

[2] (1886) 33 Ch. D. at p. 262. *Note* the observations of Cotton, L.J., on the difference between light and air as to the manner in which they respectively arrive at the dominant tenement.

[3] *Ibid.* at p. 259.

[4] (1881) 6 App. Cas. at p. 824.

[5] Referring to *Att.-Genl.* v. *Doughty* (1752), 2 Ves. Sen., 453.

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"very large and indefinite area, should not be allowed to be "created except by actual agreement. And this seems to me "to be the real ground on which *Webb* v. *Bird*[1] and *Chasemore* "v. *Richards*[2] are to be supported. The rights there claimed "were analogous to prospect in this, that they are vague and "undefined, and very extensive."

Bass v. *Gregory*.

In *Bass* v. *Gregory*,[3] where the plaintiff claimed the right to ventilate his cellar by means of a ventilating shaft from which the air passed into, and out of, a disused well belonging to the defendant, it was held that the right to the uninterrupted flow of air through a definite channel could be acquired by user for the requisite period, and an injunction was granted to restrain interference with it.

Aldin v. *Latimer Clark, Muirhead & Co.*

Aldin v. *Latimer Clark, Muirhead & Co.*[4] was a case of implied grant arising out of a lease whereby land was demised to the plaintiff for the purpose of carrying on the business of a timber merchant, and the plaintiff covenanted to carry on such business.

The defendants, who were assigns of the lessor, having erected buildings on adjoining property acquired by them from him, the plaintiff complained that the erections injuriously affected the access of air to his drying sheds so as to render them substantially less useful for the purpose of his business.

It was decided by reference to the principles governing the acquisition of the right to the access of air by user, that under a grant expressed in general terms and not for any specific purpose, the grantee will not acquire a right by way of easement to the access of air unless such right is enjoyed through a definite aperture in the property granted, or through a definite channel over adjoining property. The plaintiff was, however, granted relief in damages[5] upon the general rule that a grantor may not derogate from his own grant.[6]

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[1] *Ubi sup.*

[2] (1859) 7 H. L. C., 349. This was a case of subterranean water flowing in unknown and undefined channels, *see infra*, Part III, C.

[3] (1890) 25 Q. B. D., 481; 59 L. J. Q. B., 574.

[4] (1894) 2 Ch., 437; 63 L. J. Ch., 601.

[5] The damage not being sufficient to justify the granting of an injunction.

[6] *See* further, *infra*, Chap. VI, Part IV, B. I (*a*) 1 and 2.

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Chastey v. *Ackland*.

Chastey v. *Ackland* [1] is a later authority for the proposition that a right to have air come over a neighbour's land in a definite channel may be established by immemorial user, but this case and the more recent decision of the Court of Appeal in *Davis* v. *Town Properties Investment Corporation, Ltd.*,[2] in which the facts were very similar to those in *Bryant* v. *Lefever*,[3] affirm the equally well-established principle that the right to a general and undefined current of air is incapable of acquisition otherwise than by express agreement.

Davis v. *Town Properties Investment Corporation, Ltd.*

Cable v. *Bryant*.

In *Cable* v. *Bryant*,[4] which, like *Aldin* v. *Latimer Clark, Muirhead & Co.*,[5] was decided upon the principle of non-derogation, it was considered that an easement of air can be acquired by prescription where the air has been enjoyed through a particular aperture in the dominant tenement, that where such aperture has existed for the prescriptive period it is not necessary to the acquisition of the right that the air should also have come through a defined channel on the servient tenement, and that in this respect there is no distinction between the acquisition of a right to light and a right to air.

English principles recognised in India.

Barrow v. *Archer*.

In India, the principle established in *Webb* v. *Bird* [6] was recognised in the case of *Barrow* v. *Archer*,[7] where the plaintiff claimed the right to have the south wind blow on to his premises free from all obstruction. It was urged on his behalf that climatic conditions and the circumstances of the country made a direct breeze from the south almost a necessity, but the Court declined to give effect to this argument on the ground that it was necessary for it to see that the servient tenement was not made subservient to more than the law required.

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[1] (1895) 2 Ch., 389. There was an appeal to the House of Lords, which was settled upon terms; but it appears that during the argument several of the Law Lords dissented from the reasoning and decision of the Court of Appeal. It is not stated in the report in what respect; but apparently such dissent did not touch the general proposition above stated, *see* (1897) App. Cas., 155.

[2] (1903) 1 Ch., 797.

[3] *Ubi sup.*

[4] (1908) 1 Ch., 259.

[5] *Ubi sup.*

[6] *Ubi sup.*

[7] (1863) 2 Hyde, 125.

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Bagram v. *Khettranath Karformah*

And in *Bagram* v. *Khettranath Karformah*,[1] where a similar claim was put forward, Peacock, C.J., said: "I am of opinion "that by the use of the south window uninterruptedly for "upwards of twenty years, the plaintiff did not acquire a right "to enjoy the south breeze without obstruction. Such a right "may be acquired by express grant, but it cannot be acquired "merely by presumption arising from user, whether the pre-"sumption is a presumption of prescription or not."

Delhi and London Bank v. *Hem Lall Dutt*

The same principle was followed in the case of *The Delhi and London Bank* v. *Hem Lall Dutt*.[2]

Indian Easement Act, s. 17 (*b*).

And in harmony with the general law is section 17 (*b*) of the Indian Easements Act, which enacts that a right to the free passage of light and air to an open space of ground cannot be acquired by prescription.[3]

Nature of aperture in India.

And it seems that in India, the aperture in respect of which the easement of light and air can be acquired is not necessarily confined to a window, for in India except, perhaps, during the monsoon, a door may be as effective as a window for the admission of light and air.[4]

The result of the authorities may shortly be stated to be—

(1) That a prescriptive right to light may be acquired by the uninterrupted enjoyment of the light for the necessary period through a definite aperture in the dominant tenement.

(2) That a right to air can be acquired as an easement just as a right to light can be so acquired, and is equally capable of acquisition by prescription, though under the general law the prescriptive right to air differs in its extent from the prescriptive right to light.[5]

(3) That the distinctive physical conditions of the two elements and the manner of their arrival, respectively, at the dominant tenement render it essential to the convenient and reasonable enjoyment of the servient tenement, that the access of air to the dominant tenement should be regulated either by

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[1] (1869) 3 B. L. R., O. C. J. at p. 46.

[2] (1887) L. R. 15 Cal., 839.

[3] *See* App. VII.

[4] *See Ratanji H. Bottlewalla* v. *Edalji H. Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.) at p. 190.

[5] *See infra* under "Extent of prescriptive rights to light and air."

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a definite aperture in the dominant tenement, or through a definite channel on the servient tenement, according to the particular character of the dominant tenement.

Actual user of the dominant tenement not essential to acquisition of the right.

For the acquisition of rights to light and air there need be no *actual* user of the dominant tenement. The existence of the aperture and the possibilities of user are sufficient.

Hence, as soon as a house is structurally completed and the windows put in, or when a house has assumed the appearance and outward aspect of a dwelling-house and is so far completed as to shew an intention to use it as a dwelling-house with certain windows, enjoyment for the purposes of acquisition starts from that time and is not dependent on actual occupation or on the fitness of the house for occupation.[1]

Extent of prescriptive rights to light and air.

It has become usual to associate "air" with "light," and to speak of cases arising out of an interference with ancient lights[2] as cases of light and air, but, strictly, this is inaccurate,[3] for though the words "light and air" have crept together into pleadings,[4] and have been inserted together in decrees as though the two things went *pari passu*,[5] it will be seen that, except under the Indian Easements Act, easements of "light" and "air" must be treated as distinct in reference to the principles upon which the protection of the prescriptive rights respectively, depends.

It will also be seen that there is a variation between the law contained in the Indian Easements Act and the law outside the Act, which may, for convenience, be called the general law, and, also, an apparent inconsistency in the Act itself, in

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[1] *Pranjivandas* v. *Meyaram* (1862), 1 Bom. H. C. (O. C. J.), 148; *Courtauld* v. *Legh* (1869), L. R., 4 Exch., 126; *Elliott* v. *Bhuban Mohan Banerjee* (1873), 12 B. L. R., 406; Ind. App., Supp. Vol., 175; *Cooper* v. *Straher* (1888), 40 Ch. D., 211; *Collis* v. *Laugher* (1894), 3rd Ch., 659; *Smith* v. *Baxter* (1900), 2 Ch., 138 (143); *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at p. 206.

[2] "Ancient Lights" are windows which have existed more than twenty years, *Turner* v. *Spooner* (1861), 30 L. J. N. S. Ch., 801; 1 Dr. & Sm., 467.

[3] *Bryant* v. *Lefever* (1880), 4 C. P. D. at p. 188.

[4] *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App. at p. 221.

[5] *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq. at p. 252.

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regard to the extent of the prescriptive right to light and its infringement.[1]

It is accordingly proposed to treat separately, in these respects, the general law and the law under the Indian Easements Act.

(1) The Prescriptive Right to Light.

(a) *Under the General Law.*

In England. In England, until the recent authoritative pronouncement of the law in the case of *Colls* v. *Home and Colonial Stores, Ltd.*,[2] there was a divergence of view upon the question of what constituted an actionable obstruction of ancient lights. This divergence of view arose from a difference of opinion as to the meaning and effect of the provision of the Prescription Act, and is apparently to be traced to certain expressions which are to be found in judgments delivered in the House of Lords in the case of *Tapling* v. *Jones*.[3]

The extreme view on the one side was that the right conferred by the statute was the right to the whole, or substantially the whole, quantity of light which had come to the windows during a period of twenty years.

The extreme view on the other side was that the right was limited to a sufficient quantity of light for ordinary purposes.

In the earlier authorities, prior to the Prescription Act, the obscuration of ancient lights was dealt with on the footing of a nuisance.

Baten's case. In *Baten's case*,[4] the right was asserted and sustained by an action on the case for nuisance, a form of action in which damages might be recovered and judgment had for removal or abatement of the nuisance.

Aldred's case. In *Aldred's case*,[5] already referred to, Lord Coke says that an action lies for nuisance due to light as one of the three essential requisites of habitation.

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[1] *See infra* for the law under the I. E. Act.

[2] (1904) App. Cas., 179.

[3] *Ibid.* at p. 189.

[4] (1738) 9 Rep., 53*b*.

[5] (1738) 9 Rep., 57*b*.

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Fishmongers Co. v. East India Co.

Later, in 1752, Lord Hardwicke, in *Fishmongers Co.* v. *East India Co.*,[1] said: "As to the question whether the "plaintiffs' messuage is an ancient building so as to entitle "them to the right of the lights, and whether the plaintiffs' "lights will be darkened, I will not determine it here, for if "it clearly appeared that what the defendants are doing is "what the law considers as a nuisance, I would put it in a "way to be tried. . . ."

"But I am of opinion that it is not a nuisance contrary to "law, for it is not sufficient to say it will alter the plaintiffs' "lights, for then no vacant piece of ground could be built on "in the city, and here there will be seventeen feet distance, "and the law says it must be so near as to be a nuisance. It "is true the value of the plaintiffs' house may be reduced by "rendering the prospect less pleasant, but that is no reason "to hinder a man from building on his own ground."

Back v. Stacey.

In *Back* v. *Stacey*,[2] decided in 1826, in terms which have been accepted as the most satisfactory statement of the rule to be applied in all cases of ancient lights,[3] Best, C.J., said that it was not sufficient to constitute an illegal obstruction that the party complaining had *less* light than before, but that in order to give a right of action there must be a substantial privation of light sufficient to render the occupation of the dominant tenement uncomfortable, and to prevent the carrying on of the business therein beneficially as before.

Parker v. Smith.

In *Parker* v. *Smith*,[4] the earliest reported case after the passing of the Prescription Act,[5] it was determined that the "diminution of light and air which the law recognises as "the ground of an action against a party who builds near "another's premises is such as really makes them to a

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[1] (1752) 1 Dick., 163.

[2] (1826) 2 C. & P., 465; 31 R. R., 679.

[3] *See Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238 (245); *Ecclesiastical Commissioners* v. *Kino* (1880), 14 Ch. D., 213; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at pp. 186, 191, 208.

[4] (1832) 5 C. & P., 438; 38 R. R., 828.

[5] The Act came into operation on the first day of Michaelmas Term, 1832.

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"sensible degree less fit for the purposes of business or "occupation."

In *Wells* v. *Ody*,[1] this statement of the law was adopted by Parke, B., in his charge to the jury. *Wells* v. *Ody*.

In *Tapling* v. *Jones*,[2] it was assumed by Lords Westbury, Cranworth, and Chelmsford that by section 3 of the Prescription Act an enjoyment of light for a period of twenty years conferred an absolute and indefeasible right immediately on the expiration of such period.[3] Upon this assumption was founded the extreme view, first above stated, and conspicuous in *Calcraft* v. *Thompson*,[4] *Moore* v. *Hall*,[5] and *Scott* v. *Pope*,[6] that the extent of the prescriptive right was to be measured by the whole, or substantially the whole, quantity of light which had come to the windows during the period of twenty years.[7] *Tapling* v. *Jones*.

In *Clarke* v. *Clark*,[8] Lord Cranworth, following the same line as Lord Hardwicke in *Fishmongers Co.* v. *East India Co.*,[9] and Best, C.J., in *Back* v. *Stacey*,[10] decided that the obstruction of light in that case was not such as to amount to a nuisance upon the ground that the plaintiff had failed to shew that the defendant's buildings caused an obstruction which interfered with the ordinary occupations of life. *Clarke* v. *Clark*.

In *Robson* v. *Whittingham*,[11] Knight Bruce and Turner, L.JJ., expressed their entire approval of Lord Cranworth's judgment in *Clarke* v. *Clark*,[12] and in *Kelk* v. *Pearson*[13] it was expressly decided that the true construction of the Prescription Act did not support the views expressed in *Tapling* v. *Jones*,[14] *Calcraft* v. *Thompson*,[15] and *Scott* v. *Pope*.[16] James, L.J., there says[17]: "I am of opinion that the statute has in no degree "whatever altered the pre-existing law as to the nature and *Robson* v. *Whittingham*. *Kelk* v. *Pearson*.

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[1] (1836) 7 C. & P., 410.
[2] (1865) 11 H. L. C., 290.
[3] *See Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at p. 189.
[4] (1867) 15 W. R., 387.
[5] (1878) 3 Q. B. D., 178.
[6] (1886) 31 Ch. D. 571.
[7] *See Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at pp. 189, 199, 206.
[8] (1866) L. R., 1 Ch. App., 16.
[9] *Ubi sup.*
[10] *Ubi sup.*
[11] (1866) L. R., 1 Ch. App., 442.
[12] *Ubi sup.*
[13] (1871) L. R., 6 Ch. App., 809.
[14] *Ubi sup.*
[15] *Ubi sup.*
[16] *Ubi sup.*
[17] L. R., 6 Ch. App. at p. 811.

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"extent of this right. The nature and extent of the right "before that statute was to have that amount of light through "the windows of a house which was sufficient, according to the "ordinary notions of mankind, for the comfortable use and "enjoyment of that house as a dwelling-house, or for the "beneficial use and occupation of the house if it were a ware-"house, shop, or other place of business. That was the extent "of the easement, a right to prevent your neighbour from "building on his land so as to obstruct the access of sufficient "light and air to such an extent as to render the house "substantially less comfortable and convenient."

City of London Brewery Co. v. *Tennant.*

In *City of London Brewery Co.* v. *Tennant*,[1] Lord Selborne fully concurred in this view of the law which, in his opinion, corrected some impressions which might have arisen from the language used by judges in former cases.

Lanfranchi v. *Mackenzie.*

In *Lanfranchi* v. *Mackenzie*,[2] the plaintiffs claimed that they were entitled to an extraordinary amount of light for the purposes of a special business, the examination of samples of raw silk, which had been carried on by them for fourteen years. Light, but not the special light required, had been enjoyed through the particular window for twenty years, but Malins, V.C., on the authority of *Martin* v. *Goble*,[3] decided that a user for twenty years for ordinary purposes could not found a right to user for extraordinary purposes, which had not been proved to exist for the same period.[4]

Warren v. *Brown.*

In *Warren* v. *Brown*,[5] the Court of Appeal, reversing the decision of Wright, J.,[6] and dissenting from *Lanfranchi* v. *Mackenzie*,[7] in effect decided that the owner of a dominant tenement is entitled to have substantially undiminished the full amount of light which has had access to the tenement by the ancient window during the previous twenty years without reference to any internal alteration of the dominant tenement,

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[1] (1873) L. R., 9 Ch. App., 212. And *see Lady Stanley of Alderley* v. *Earl of Shrewsbury* (1875), L. R., 19 Eq., 616.

[2] (1867) L. R., 4 Eq., 421.

[3] (1808) 1 Camp., 320.

[4] *See* a similar decision by the same judge in *Dickinson* v. *Harbottle* (1873), 28 L. J. N. S. Ch., 186.

[5] (1902) 1 K. B., 15.

[6] (1900) 2 Q. B., 722.

[7] *Ubi sup.*

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or its adaptation to some special purpose for which an extraordinary amount of light might be required, within such period. In other words, *Warren* v. *Brown* [1] and the class of decisions to which it belongs make "actual user" the test of whether there has been an infringement of the legal right notwithstanding that the protection of the dominant owner might in fact impose an increased burthen on the servient tenement.

Colls v. *Home and Colonial Stores, Ltd.*

The confusion and uncertainty introduced into the law by the departure of the two extreme classes of decisions from the fixed line laid down in the earlier authorities, and adhered to notably in *Clarke* v. *Clark*,[2] *Kelk* v. *Pearson*,[3] and *City of London Brewery Co.* v. *Tennant*,[4] have been removed by the recent decision in *Colls* v. *Home and Colonial Stores, Ltd.*[5] There the judgments of the Lord Chancellor and the Law Lords, while separately dealing with various important matters incidental to the main question, are unanimous in adopting as sound and unquestionable law the doctrine laid down in *Fishmongers Co.* v. *East India Co.*,[6] *Back* v. *Stacey*,[7] *Kelk* v. *Pearson*,[8] and *City of London Brewery Co.* v. *Tennant*,[9] that the nature and extent of the right of the owner of ancient lights is to have that amount of light which is sufficient according to the ordinary notions of mankind for the comfortable use and enjoyment of the house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house, if it is a warehouse, or shop, or other place of business.

In the case under reference the facts were as follows:—The appellant was the owner of land on which he proposed to erect a building of such a height as the respondents believed would obstruct ancient lights in a building of which they were the lessees, and in which they carried on their business. They

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[1] (1902) 1 K. B., 15.
[2] *Ubi sup.*
[3] *Ubi sup.*
[4] *Ubi sup.*
[5] (1904) App. Cas., 179.
[6] *Ubi sup.*
[7] *Ubi sup.*
[8] *Ubi sup.*
[9] *Ubi sup.*

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accordingly brought an action against the appellant for an injunction.

Joyce, J., following the judgment of Wright, J., in *Warren* v. *Brown*,[1] which had not then been reversed by the Court of Appeal, dismissed the action upon the finding that the proposed building would not affect the selling or letting value of the respondents' premises which would still be sufficiently lighted for the ordinary purposes of occupancy or a place of business. Between this decision and the decision of the Court of Appeal the appellant put up his proposed building.

The Court of Appeal upon the finding that the new building constituted a substantial interference with the respondents' ancient lights as theretofore enjoyed whereby real damage would be caused to the respondents, and relying on the previous decision of the Court of Appeal in *Warren* v. *Brown*,[2] reversed the decision of Joyce, J., and granted an injunction restraining the appellant from building so as to darken, injure, or obstruct any of the respondents' ancient lights or windows as theretofore enjoyed, and ordering him to pull down the new building.[3]

On appeal to the House of Lords, the judgment of the Court of Appeal was reversed and that of Joyce, J., restored. *Warren* v. *Brown* in the Court of Appeal was by a necessary consequence overruled.

The final decision in *Colls* v. *Home and Colonial Stores, Ltd.*,[4] cannot be better or more succinctly stated than as appears in the headnote to the report as follows:—

"To constitute an actionable obstruction of ancient lights "it is not enough that the light is less than before. There "must be a substantial privation of light, enough to render "the occupation of the house uncomfortable according to the "ordinary notions of mankind and (in the case of business "premises) to prevent the plaintiff from carrying on his "business as beneficially as before."

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[1] (1900), 2 Q. B., 722.
[2] (1902) 1 K. B., 15.
[3] (1902) 1 Ch., 302.
[4] (1904) App. Cas., 179.

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"The nature of the right to light and of an infringement "was not altered by the Prescription Act."[1]

In the course of his judgment, Lord Halsbury, L.C., says[2]: "The question may be very simply stated thus: after an "enjoyment of light for twenty years, or if the question arose "before the Act for such a period as would justify the pre- "sumption of a lost grant, would the owner of the tenement "in respect of which such enjoyment had been possessed be "entitled to *all* the light without any distinction whatsoever "at the end of such a period?" Lord Halsbury in *Colls' case*.

"My Lords, if that were the law it would be very far "reaching in its consequences, and the application of it to its "strict logical conclusion would render it almost impossible "for towns to grow, and would formidably restrict the rights "of people to utilise their own land. Strictly applied, it "would undoubtedly prevent many buildings which have "hitherto been admitted to be too far removed from others to "be actionable, but if the broad proposition which underlies "the judgment of the Court of Appeal be true, it is not a "question of forty-five degrees, but any appreciable diminution "of light which has been enjoyed (that is to say, has existed "uninterruptedly for twenty years) constitutes a right of "action, and gives a right to the proprietor of the tenement "that has had this enjoyment to prevent his neighbour from "building on his own land."

"My Lords, I do not think that this is the law. The "argument seems to me to rest upon a false analogy, as "though the access to and enjoyment of light constituted a "sort of proprietory right in the light itself. Light, like air, "is the common property of all, or, to speak more accurately, "it is the common right of all to enjoy it, but it is the "exclusive property of none."

Lord Macnaghten commences a most lucid and instructive judgment in the following words[3]: "My Lords, the right Lord Macnaghten in *Colls' case*.

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[1] *See* further, Chap. VII, Part I.

[2] (1904) App. Cas. at pp. 182, 183.

[3] *Ibid.* at p. 185.

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"of a person who is owner or occupier of a building with "windows, privileged as ancient lights, in regard to the pro- "tection of the light coming to those windows, is a purely "legal right. It is an easement belonging to the class known "as negative easements. It is nothing more or less than the "right to prevent the owner or occupier of an adjoining "tenement from building or placing on his own land anything "which has the effect of illegally obstructing or obscuring "the light of the dominant tenement."

Then, after reviewing the history of the law and expressing his satisfaction with the rule as stated in *Back* v. *Stacey*[1] and *Parker* v. *Smith*,[2] and explaining that, so far as the right to light is a legal right, the Court in the exercise of its jurisdiction must be guided by the principles established at law, he proceeds to demonstrate how the Courts had been led astray by certain observations in *Tapling* v. *Jones*,[3] as to the meaning and effect of the Prescription Act and how the Act ought properly to be construed. The following passage shews that, in his opinion, the modern tendency has been to shew too much consideration for the dominant owner, and too little for the servient owner. He says[4]: "As far as my experience "goes, there is quite as much oppression on the part of those "who invoke the assistance of the Court to protect some "ancient light, which they have never before considered of "any great value, as there is on the part of those who are "improving the neighbourhood by the erection of buildings "that must necessarily to some extent interfere with the "light of adjoining premises."

Lord Davey in *Colls' case.*

Lord Davey in an equally interesting and instructive judgment reviews all the authorities from *Aldred's case*[5] onwards, and after accepting as good law the decisions in *Clarke* v. *Clark*,[6] *Kelk* v. *Pearson*,[7] and *City of London Brewery Co.* v. *Tennant*,[8] closely criticises the judgment of the Court of

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[1] *Ubi sup.*
[2] *Ubi sup.*
[3] *Ubi sup.*
[4] (1904) App. Cas. at p. 193.
[5] *Ubi sup.*
[6] *Ubi sup.*
[7] *Ubi sup.*
[8] *Ubi sup.*

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Appeal in *Warren* v. *Brown*[1] and the judgment under appeal and dissents from them, at the same time expressing his approval of the decision of Malins, V.C., in *Lanfranchi* v. *Mackenzie*.[2]

It will be useful to reproduce certain passages in his judgment. He says[3]: "It is agreed on all hands that a man "does not lose or restrict his right to light by non-user of his "ancient lights, or by not using the full measure of light "which the law permits."

"If that measure be by common law or by the statute the "whole amount of light which has had access to his windows, "*cadit quæstio*. But if this view of the law be not accepted, "you must introduce that 'supposed standard' which Romer, "L.J., repudiates."

"If the actual user is not the test where the use falls below "the standard of what may reasonably be required for the "ordinary uses of inhabitancy and business, why (it may be "asked) should it be made a test where the use has been of a "special or extraordinary character in excess of that standard? "It does seem to me unreasonable to hold that where a man "for his own convenience or profit converts two or more rooms "of his house into one without making provision for lighting "them, or converts a portion of his house into a photographic "studio, or puts it to some similar purpose, he can suddenly "call on his neighbour to leave him a supply of light which is "rendered necessary only by such alterations, and thereby "impose what is in substance and in truth an increased "burthen on his neighbour."

"If the action be brought a month before the change it "would be dismissed. If it be brought a month afterwards an "injunction would be granted. I am of opinion that the "Courts have gone too far in this question of lights, and have "imposed undue restrictions on persons in the exercise of "their lawful right to build on their own land."

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[1] *Ubi sup.*
[2] *Ubi sup.*
[3] (1904) App. Cas. at p. 203.

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And later on he sums up the whole purport of his judgment in the following words[1]: "According to both principle and "authority, I am of opinion that the owner or occupier of the "dominant tenement is entitled to the uninterrupted access "through his ancient windows of a quantity of light, the "measure of which is what is required for the ordinary "purposes of inhabitancy or business of the tenement according "to the ordinary notions of mankind, and that the question "for what purpose he has thought fit to use that light, or the "mode in which he finds it convenient to arrange the internal "structure of his tenement, does not affect the question. The "actual user will neither increase nor diminish the right. "The single question in these cases is still what it was in the "days of Lord Hardwicke and Lord Eldon—whether the "obstruction complained of is a nuisance."

Lord Lindley in *Colls' case.*

Lord Robertson agreed in Lord Davey's judgment.[2] Lord Lindley in coming to the same conclusion as the Lord Chancellor and the other Law Lords made, amongst others, the following observations: "In considering what is an actionable "nuisance, regard is had, not to special circumstances which "cause something to be an annoyance to a particular person, "but to the habits and requirements of ordinary people, and it "is by no means to be taken for granted that a person who "wants an extraordinary amount of light for a particular "business can maintain an action for a diminution of light if "only his special requirements are interfered with."[3]

And again[4]: "The purpose for which a person may desire "to use a particular room or building in future does not either "enlarge or diminish the easement which he has acquired. "If he chooses in future to use a well-lighted room or building "as a lumber-room for which little light is required, he does "not lose his right to use the same room or building for some "other purpose for which more light is required. *Aynsley* v. "*Glover*[5] is in accordance with this view. But if a room or

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[1] *Ibid.* at p. 204.
[2] *Ibid.* at p. 204.
[3] *Ibid.* at p. 209.
[4] *Ibid.* at p. 214.
[5] (1874) L. R., 18 Eq., 544; L. R., 10 Ch. App., 283.

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"building has been so built as to be badly lighted, the owner "or occupier cannot by enlarging the windows or altering the "purpose for which he uses it increase the burden on the "servient tenement. *Martin* v. *Goble*,[1] where a malthouse "was turned into a workhouse, may, I think, be upheld on this "principle; and the observations of Wood, V.C., on *Martin* v. "*Goble*[2] in *Dent* v. *Auction Mart Co.*[3] support this view."

Summary of decision of House of Lords in *Colls' case*.

Such is *Colls* v. *Home and Colonial Stores, Ltd.*,[4] in the House of Lords. It has overruled *Warren* v. *Brown* in the Court of Appeal, and it has withdrawn from the category of good law certain views and expressions as to the construction of the Prescription Act and the nature of the right to light to be found in *Tapling* v. *Jones*,[5] *Calcraft* v. *Thompson*,[6] *Moore* v. *Hall*,[7] and *Scott* v. *Pope*.[8] In so doing, it has restored *Martin* v. *Goble*[9] and *Lanfranchi* v. *Mackenzie*[10] and corrected certain impressions as to *Yates* v. *Jack*.[11] It has established a definite and reasonable compromise between the two extreme views favouring the dominant and servient tenement respectively, and its broad results may be summarised in the following propositions :—

(1) The single question in all cases of obstruction of ancient lights is whether the particular obstruction amounts to a nuisance.

(2) For the purpose of this question the actual present user of the dominant tenement is immaterial. It will neither increase nor diminish the right.[12]

(3) There can be no such thing as a right to a 'fixed quantity of light by metes and bounds.

(4) The Prescription Act has not altered the nature and extent of the right to light as established by the earlier authorities.[13]

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[1] (1808) 1 Camp., 320.
[2] *Ubi sup.*
[3] (1866) L. R., 2 Eq., 238.
[4] (1904) App. Cas., 179.
[5] *Ubi sup.*
[6] *Ubi sup.*
[7] *Ubi sup.*
[8] *Ubi sup.*
[9] *Ubi sup.*
[10] *Ubi sup.*
[11] (1866) L. R., 1 Ch. App., 295.
[12] *See* this question further considered in Chap. VIII, Part I.
[13] *See* further, Chap. VII, Part I.

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Doctrine of *Colls'* case explained and applied.

Colls v. *Home and Colonial Stores, Ltd.*,[1] has been considered and applied in various subsequent decisions, to which a brief reference will be sufficient.

Ambler v. *Gordon*.

In *Ambler* v. *Gordon*,[2] following a dictum of Malins, V.C., in *Lanfranchi* v. *Mackenzie*,[3] and the views expressed by Lords Davey and Lindley in *Colls' case*,[4] it was held that twenty years' enjoyment of special or extraordinary light, even to the knowledge of the servient owner, will not give a larger right than a right to ordinary light; that is, such amount of light as is required for an ordinary business.[5]

This decision carries to its extreme length the doctrine against the acquisition of a prescriptive right to extraordinary light, but it appears to be the logical result of Lord Davey's and Lord Lindley's opinions. Thus, it may be said that if the owner of ancient lights requires an extraordinary, or special, amount of light for the purposes of his business, he must obtain it, if he can, by artificial means, but he cannot by prescription compel the owner of the servient tenement to give it him.

Kine v. *Jolly*.

In *Kine* v. *Jolly*, the doctrine of *Colls' case* was followed and applied by the Court of Appeal,[6] and affirmed by Lord

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[1] (1904) App. Cas., 179.

[2] (1905) 1 K. B., 417.

[3] *Ubi sup.*

[4] (1904) App. Cas., 179.

[5] It cannot be predicated as a matter of law whether any particular business is an ordinary business; that is a question of fact in each case, (1905) 1 K. B., 417.

[6] (1905) 1 Ch., 480. This decision was affirmed in the House of Lords, the House being equally divided. Vaughan Williams, L.J., observes that the rule in *Colls' case* owes its existence to the convenience and comfort of the people at large, and that it is convenient that no man should be allowed to enforce rights to such an extent or to interfere with the good and progress of the community, *Ibid.* at p. 489. He further points out, in reference to the doctrine of *Colls' case*, that the mere fact that the quantity of light finding access to a particular room after an obstruction amounts to a sufficiency for the purpose for which the room was designed will not necessarily exclude the conclusion that the obstruction has interfered with the comfort and convenience or usefulness of a room according to the ordinary notions of mankind, *Ibid.* at p. 493. Cozens-Hardy, L.J., suggests that the decision in *Colls' case* does not amount to more than that an obstruction which neither lessens the letting or selling value of the house, nor materially affects the comfort or convenience of the occupier, does not in law justify an action, even though a large proportion of light previously enjoyed has been lost, *Ibid.* at pp. 502, 503.

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Loreburn, L.C., and Lord James of Hereford in the House of Lords.[1]

Higgins v. *Betts*,[2] founded on *Ambler* v. *Gordon*[3] and *Kine* v. *Jolly*,[4] lays down that in considering whether an obstruction of ancient lights amounts to an actionable nuisance, the test is not whether so much light has been taken as materially to lessen the enjoyment and use of the house that its owner previously had, but whether so much is left as is enough for the comfortable use and enjoyment of the house according to the ordinary notions of mankind.[5]

Higgins v. *Betts*.

In *Ankerson* v. *Connelly*,[6] it is said that the burthen cast on the servient tenement by *Colls' case* is that the owner of the servient tenement is prevented from erecting on his land a building in such a situation and of such a height and dimensions as will by interfering with the light passing through the ancient apertures of the house on the dominant tenement render such house substantially uncomfortable.

Ankerson v. *Connelly*.

In India, outside the Indian Easements Act,[7] the doctrine laid down by successive authorities, beginning with *Fishmongers Co.* v. *East India Co.*,[8] and finally approved in *Colls* v. *Home and Colonial Stores, Ltd.*,[9] has been followed in decisions of the Calcutta and Bombay High Courts.[10] In *Bagram* v.

In India, outside the I. E. Act.

Bagram v. *Khettranath Karformah*.

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[1] (1907) App. Cas., 1.

[2] (1905) 2 Ch., 210.

[3] *Ubi sup.*

[4] *Ubi sup.*

[5] Farwell, J., points out that the result of *Colls' case* and the earlier authorities which it establishes, is to put the case of nuisance by interference with light on the same footing as other cases of nuisance, *e.g.* noise; but that a practical difference arises from the right to light not being like freedom from unreasonable noise, an incident of property, but having to be acquired and from the necessary limitations of the right to light by the extent of the ancient lights, and that if the windows be small and few, the question propounded by Lord Robertson in *Colls' case* ((1904), App. Cas. at p. 181) may arise: "Can a man by making "one window where there should be five "to give proper light, and living twenty "years in this cave, prevent his "neighbour from building a house "which would have done no harm to "the light if there had been five "windows," (1905) 2 Ch., 210 (216).

[6] (1906) 2 Ch., 544; on appeal, (1907) 1 Ch., 678.

[7] For the law under the I. E. Act, *see infra*.

[8] (1752) 1 Dick., 163, and *see supra*.

[9] (1904) App. Cas., 179; and *see supra*.

[10] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Modhoosoodun Dey* v. *Bissonauth Dey* (1875), 15 B. L. R., 361; *Delhi and London Bank* v.

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Khettranath Karformah, Peacock, C.J., says[1]: "The only "amount of light for a dwelling-house, which, in my opinion, "can be claimed by prescription or by length of enjoyment "without an actual grant, is such an amount as is reason- "ably necessary for the convenient and comfortable habitation "of the house." And again he says[2]: "It would be unreason- "able to presume that the owner of the servient tenement "intended to grant a right to the use of more light than was "necessary for the comfortable and convenient habitation of "the dwelling-house or that he intended to increase the value "of his neighbour's house by reducing the value of his own "land. Principles of general convenience upon which pre- "sumptions of right to light by prescription or grant depend, "require that lights in a dwelling-house, which have been "uninterruptedly used for a long time shall not be darkened "so as to render the house unfit for comfortable habitation, "but they do not require such a presumption as would impede "the erection of buildings on the servient tenement, which "would not deprive the dominant house of any degree of what "was reasonably necessary for comfortable habitation."

"To carry the case further, in large cities especially, would "cause great inconvenience and depreciation of property "without any corresponding benefit."

These observations embody substantially the same rule as was laid down by Lord Cranworth in *Clarke* v. *Clark*,[3] adopted by the Lords Justices in *Robson* v. *Whittingham*,[4] and affirmed in *Colls* v. *Home and Colonial Stores, Ltd.*,[5]

Hem Lall Dutt (1887), I. L. R., 14 Cal., 839; *Anderson* v. *Haldut Roy Chamaria* (1905), 9 Cal. W. N., 543; *Anath Nath Deb* v. *Galstaun* (1908), I. L. R., 35 Cal., 661; XII Cal. W. N., 519; *Jamnadas* v. *Atmgram* (1877), I. L. R., 2 Bom., 133. And *see Ratanji H. Bottlewalla* v. *Edalji H. Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.), 181. In *Puran Madduck* v. *Ooday Chand Mullick* (1865); 3 Cal. W. R., 29, it was broadly laid down that ancient lights cannot be obstructed so as to obscure the light and air always enjoyed. But in view of the later decisions this cannot now be accepted as an accurate statement of the law.

[1] *Ubi sup.* at p. 46.

[2] *Ibid*, at pp. 50, 51.

[3] (1866) L. R., 1 Ch. App., 16; and *see supra*. *See* also *Modhoosoodun Dey* v. *Bissonauth Dey*, *ubi sup.* at p. 370.

[4] (1866) L. R., 1 Ch. App., 442, and *see supra*. *See* also *Modhoosoodun Dey* v. *Bissonauth Dey*, *ubi sup.* at p. 370.

[5] (1904) App. Cas., 179; and *see supra*.

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and are applicable to cases governed by the Indian Limitation Acts.[1]

The principle affirmed in *Colls' case* that an obstruction of ancient lights, in order to be actionable, must be such as to amount to a nuisance has been applied in a recent decision of the Calcutta High Court, where the defendant having built a wall on his land and thereby obstructed the flow of light and air to the plaintiffs' godown to such an extent as to prevent the plaintiffs from carrying on their jute business as beneficially as before, it was held that the plaintiffs were entitled to an injunction.[2]

(*b*) *Under the Indian Easements Act.*

The law under the Indian Easements Act relating to the prescriptive right to light is to be found in sections 15, 28 (*c*), and 33, Expl. II,[3] the provisions of which are partly at variance with the general law and, apparently, partly inconsistent with each other. Indian Easements Act, ss. 15 and 28 (*c*).

Sections 15 and 28 (*c*) are identical, and give effect to one of the divergent views discussed and rejected in *Colls* v. *Home and Colonial Stores, Ltd.*,[4] namely, that the extent of the prescriptive right is the whole quantity, or substantially the whole quantity, of light which has come to the aperture during a period of twenty years, irrespectively of the purposes for which it has been used. That this statutory rule is not in accord with the recent English decisions in *Colls* v. *Home and Colonial Stores, Ltd.*,[5] and *Kine* v. *Jolly*,[6] has been pointed out in the recent case of *Kunni Lal* v. *Kundan Bibi*,[7] where it was observed that those decisions would have had a distinct bearing on the case had it not been governed by the provisions of the Indian Easements Act as contained in sections 15 and 28 (*c*). It is to be regretted that in the last-mentioned case *Kunni Lal* v. *Kundan Bibi*.

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[1] *Delhi and London Bank* v. *Hem Lall Dutt*, *ubi sup.* at p. 355.

[2] *Anderson* v. *Haldut Roy Chamaria*, *ubi sup.* And *see Anath Nath Deb* v. *Galstaun* (1908), I. L. R., 35 Cal., 661; XII Cal. W. N., 519.

[3] *See* App. VII.

[4] (1904) App. Cas., 179, and *see supra*.

[5] (1904) App. Cas., 179.

[6] (1905) 1 Ch., 480; (1907) App. Cas., 1.

[7] (1907) I. L. R., 29 All., 571.

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the provisions of section 33, Expl. II, were not noticed, as in one view they appear to be hardly consistent with sections 15 and 28 (*c*), and involve the application of inconsistent doctrines.

Indian Easements Act, s. 33, Expl. II.

Under section 33, Expl. II, the remedy appears to fall short of the right conferred by sections 15 and 28 (*c*), but to go further than the general rule, for whereas under the two latter sections the extent of the prescriptive right is to be measured by the quantity of light accustomed to enter the aperture during the prescriptive period without reference to its user, under the former section the owner of the dominant tenement would, apparently, have no remedy for the diminution of such accustomed quantity of light provided the obstruction did not materially interfere with his physical comfort or did not prevent him from carrying on his accustomed business in the dominant tenement as beneficially as he had done previous to instituting the suit.

The words "accustomed business" suggest the conclusion that the section is not intended to go as far as the recent English decisions in *Ambler* v. *Gordon*[1] and *Higgins* v. *Betts*,[2] which regard as incapable of acquisition a prescriptive right to an extraordinary amount of light, but is intended to provide a remedy in all cases where there is a material interference with the beneficial user of the dominant tenement as a place of business according to the standard of light which the particular and accustomed business may require.

The meaning of the words "accustomed business" is not very clear. They may be intended to mean the business which the owner of the dominant tenement has been accustomed to carry on during the whole of the prescriptive period,[3] or it may be argued that the section must be read with section 28 (*c*), and must be construed so as to protect any business which is actually being carried on at the date of the institution of the suit, though commenced within the prescriptive

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[1] (1905) 1 K. B., 417; and *see supra*.

[2] (1905) 2 Ch., 210; and *see supra*.

[3] This construction would involve reading in the additional words used in s. 28 (c).

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period,[1] provided that such business does not require more light than has been accustomed to enter the window, door, or other opening during the whole of the prescriptive period.

If the former view be adopted, the section is partially inconsistent with section 28 (*c*), which makes of no account the purpose for which the light has been used, but if, on the other hand, in order to avoid an apparent inconsistency, the latter view should prevail, the law of the Act comes into complete conflict with the law outside the Act. The correct construction of the three sections when read together has not yet been judiciously determined, but there are large and important cities in the territories governed by the Act, and it appears to be a matter for regret that, in this respect, the law of Easements in British India is not uniform.

(2) The Prescriptive Right to Air.

(*a*) *Under the General Law.*

In England the protection of the prescriptive right to air is governed by different principles from those which, as has been seen, regulate an infringement of the prescriptive right to light. The remedy for the obstruction of air, whether the air has been enjoyed for the purpose of habitation or trade, proceeds on the ground of injury to health or something very nearly approaching it. In England.

In *City of London Brewery Co.* v. *Tennant*, Lord Selborne, L.C., said[2]: "Now, the nature of the case which would have to "be made for an injunction by reason of the obstruction of air "is *toto cælo* different from the case which has to be made for "an injunction in respect of light. It is only in rare and "special cases involving danger to health, or at least something "very nearly approaching it, that the Court would be justified "in interfering on the ground of diminution of air. There- "fore, when witnesses say that there is a material diminution *City of London Brewery Co.* v. *Tennant.*

[1] *See* the objections to this in Lord Davey's judgment in *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at pp. 196, 202, 203.

[2] (1873) L. R. 9 Ch. App. at p. 221.

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"of light and air, and say no more, they are in truth reducing "the value of their evidence as to light to the standard which "must be applied to their evidence as to air, as to which such "evidence is of no value whatever."

Other English decisions in *Gale* v. *Abbott*,[1] *Dent* v. *Auction Mart Co.*,[2] *Hall* v. *Lichfield Brewery Co.*,[3] and *Bass* v. *Gregory*,[4] are founded on the same principles and demonstrate that it is only in cases affecting the free access of salubrious air to, and the healthy ventilation of, the dominant tenement, that the dominant owner will obtain protection.

In India.

Except under the Indian Easements Act,[5] similar principles have governed the Indian decisions.[6]

It is true that in England natural conditions and other causes have made light of more account than air, and that conversely in India air is of as much importance as, and often of more importance than, light.

For this reason, arguments have been addressed to the Indian Courts in favour of assimilating cases of light and air in regard to the principles of relief for obstruction. But the Courts have felt themselves bound by the rules of English law.

Modhoosoodun Dey v. *Bissonauth Dey.*

In *Modhoosoodun Dey* v. *Bissonauth Dey*,[7] Markby, J., admitted the force of these arguments but thought he was precluded by the English and Indian authorities from adopting them. He said: "Here also I must apply the rules of "English law. No doubt this leads to some inconvenience. "The reasons for which apertures are made in the walls of "houses in the two countries are very different."

"In England an aperture is made chiefly for light; the sun "being less bright and the air colder there, we desire to obtain "all the light we can, and only to admit just so much air "as is necessary for wholesome ventilation, for which reason

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[1] (1862) 8 Jur. N. S., 987.

[2] (1866) L. R. 2 Eq., 238.

[3] (1880) 49 L. J. Ch., 655.

[4] (1890) 25 Q. B. D., 481; 59 L. J. Q. B., 574.

[5] For the law under the I. E. Act, *see infra*.

[6] *Bagram* v. *Khettranath Karformah*, *ubi sup.*; *Modhoosoodun Dey* v. *Bissonauth Dey*, *ubi sup.*; *Delhi and London Bank* v. *Hem Lall Dutt*, *ubi sup.*; *Nandkishor* v. *Bhagubhai* (1885), I. L. R., 8 Bom., 95.

[7] (1875) 15 B. L. R., 361.

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"we always use glass in our windows. In this country the "object is precisely the reverse—to get as much air as "possible, and to exclude the superfluous light. A compara- "tively small aperture will in this country light a room, but "without a free current of air a room would very often be "uncomfortable, and even unhealthy. . . . But unfortunately "the law of England being fashioned upon the wants of the "inhabitants of that country has specially favoured the "acquisition of the right to free access of light, but has taken "very little notice of the right to free access of air."[1]

(*b*) *Under the Indian Easements Act.*

In India, the inconvenience of treating air as of less account than light has been recognised by the Legislature. By sections 15, 28 (*c*), and 33, Expls. II and III, of the Indian Easements Act, prescriptive rights to light and air are treated as co-extensive, and dealt with accordingly.[2]

Protection of access of light to churches.

It has been decided that the principles by which the Court should be guided in the protection of access of light to buildings used for purposes of inhabitancy and business are applicable to a building used for ecclesiastical purposes, and that material interference with the comforts of worshippers and the illumination of mosaics and stained glass windows is as liable to be restrained as interference with the comfortable use and enjoyment of houses.

Att.-Genl. v. *Queen Anne's Mansions.*

In *Attorney-General* v. *Queen Anne's Mansions*[3] the defendants had obstructed the access of light to six windows on the south side of the Guards Memorial Chapel, Westminster, and had thereby materially interfered not only with the comfort of worshippers in the chapel, but with the illumination of the mosaics and stained glass windows with which the chapel was

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[1] *Ibid.* at p. 367; and *see* the observations of West, J., in *Nandkishor* v. *Bhajabhai*, *ubi sup.* at p. 97.

[2] *See* App. VII, and *Gazette of India*, 1880, Part V, p. 476; and Stokes, 1 Anglo-Indian Codes, p. 885.

[3] (1889), 5 Times L. R., 430.

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adorned. In granting an injunction on both grounds the Court, with reference to the mural decorations and stained glass windows, considered they were as much entitled to protection as either a picture gallery in a private house or a picture gallery in a public building appropriated to that purpose.

Questions as to light and air coming from other sources. *Dyers Co.* v. *King.*

In cases of obstruction of light and air, the light and air, if any, which comes from other sources must not be disregarded[1]; for as pointed out by James, V.C., in *Dyers Co.* v. *King*,[2] the light from other quarters, and the light which is the subject of the obstruction, may be so much in excess of what is protected by law as to render the interference complained of non-actionable.[3]

But it is only prescriptive light, or light to which a right has been acquired by grant, which, when coming from other quarters, must be taken into account; for light to which no legal right has been acquired and of which the plaintiffs may be deprived at any time ought not to be taken into account.[4]

It is, of course, immaterial that the owner of the dominant tenement is getting light and air from other sources, if he is still deprived of the quantity of light and air to which he is entitled.[5]

"Reflected" light.

The owner of the easement of light cannot complain of any act on the servient tenement whereby the light coming to his windows is increased or converted into what is called "reflected light" or into an extraordinary supply of light of a glaring character.[6] No case has occurred where under these circumstances the Court has interfered in favour of the owner or occupier of the dominant tenement.

But where there has been an actionable disturbance of

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[1] *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at p. 210; *Kine* v. *Jolly* (1905), 1 Ch. at p. 493; *Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., 252 (262).

[2] (1870) L. R., 9 Eq., 438.

[3] (1904) App. Cas. at p. 211.

[4] *Ibid.* And *see Anath Nath Deb* v. *Galstaun* (1908), I. L. R., 35 Cal., 661; XII Cal. W. N., 219.

[5] *Puran Madduck* v. *Ooday Churn Mullick* (1865), 3 W. R., 29; and *see Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., at p. 251.

[6] *Lanfranchi* v. *Mackenzie* (1867), L. R., 4 Eq., 421; *Lazarus* v. *Artistic Photographic Co.* (1897), 2 Ch., 214; *Boyson* v. *Deane* (1899), I. L. R., 22 Mad., 251 (253).

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ancient rights the dominant owner is not bound to put up with reflected light, even if it would not be substantially less than the light obstructed.[1] As in the case of light coming from other sources to which no legal right has been acquired, he has no security that the light will continue, he is entitled to stand on his legal rights and is not bound to depend on the degree of consideration which the other party may shew him from time to time.[2]

How the right to light and air should be claimed.

The right to light and air should usually be claimed as a right to light only for the reason that where light goes air also will go, and where there is a sufficient adit for light a sufficient adit for air also will be presumed,[3] and for the further reason that it is only on the ground of danger to health, or at least something very nearly approaching it, that the Court would be justified in interfering on the ground of diminution of air.[4]

Part II.—Easements of Way.

Divisible into two classes.

Rights of way are divisible into two classes: Public rights of way,[5] and Private rights of way. Private rights of way in turn are capable of division into two classes: Easements of way, and Rights in gross.[6]

Nature of Easement of way.

Easements of way form the most important class of affirmative easements. They are rights which enjoy a wider familiarity than perhaps any other kind of easement.

A right, or easement, of way is a right affirmative[7] and discontinuous,[8] appurtenant to the dominant tenement, of

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[1] *Dent* v. *Auction Mart Co.*, *ubi sup.* at p. 221.

[2] *Ibid.*

[3] *See Barrow* v. *Archer* (1863), 3 Hyde, 129; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 439.

[4] *See supra* in *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App. at pp. 251, 252; *Staight* v. *Burn* (1869), L. R., 5 Ch. App., 163; *Bottlewalla* v. *Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.), 181 (191); *Anath Nath Deb* v. *Galstaun* (1908), I. L. R., 35 Cal., 661; XII Cal. W. N., 219.

[5] *See* Chap. IV, Part II, A (2).

[6] *See* Chap. IV, Part II, A.

[7] Entitling the dominant owner to make active use of the servient tenement.

[8] Depending for its exercise on the act of the dominant owners. *See* I. E. Act, s. 5, App. VII, which defines a discontinuous easement as one that needs the act of man for its enjoyment; but *query* if this is an accurate definition. The act of man is required for the exercise or actual user of the easement, but not necessarily for the

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passage over a neighbour's land to and from the dominant tenement. It is not, as will be seen, a right to wander at pleasure, but a right to pass along a particular route from the *terminus a quo* to the *terminus ad quem*.[1]

Variety of Easements of way.

Easements of way are capable of considerable variety either as regards their nature, or their duration,[2] or the manner of their enjoyment.[3]

Thus an easement of way may be either —

(*a*) A general right of way, which is a right of way not only for foot passengers but for people on horseback, and for carts, carriages, and other vehicles[4]; or

(*b*) a driftway, which is a way limited to foot passengers, horsemen, or cattle[5]; or

(*c*) a footway *simpliciter*.[6]

The question of the precise limit of the right in any particular case must depend on the manner of acquisition, and will be reserved for consideration in a later chapter.[7]

Methods of acquisition.

An easement of way may arise in India either by the express or implied grant of the owner of the soil,[8] or by prescription,[9] or by necessity,[10] or under the Indian Limitation Act,[11] or the Indian Easement Act.[12]

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enjoyment of the easement, *see* the observations of Garth, C.J., in *Koylash Chunder Ghose* v. *Sonatun Chung Baroie* (1881), I. L. R., 7 Cal., 132; 8 C. L. R., 281, in connection with s. 26, ill. (*b*) of the Indian Limitation Act; and *see* also Chap. VII, Part II.

[1] *Goluck Chunder Chowdhry* v. *Tarnee Churn Chuckerbutty* (1865), 4 W. R., 49; S. C. *sub nom. Tarnee Churn Chuckerbutty* v. *Tarnee Churn Chuckerbutty* (1866), 1 Ind. Jur., N. S., 6; and *see Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), 1 Ch. D., 362; 45 L. J. Ch., 353.

[2] *See* Chap. I, Part I, under "Permanent and Limited Easements," and I. E. Act, s. 6, App. VII.

[3] *Ibid.*

[4] *See Cannon* v. *Villars* (1878), 8 Ch. D., 415 (420).

[5] *Ibid.* at p. 421.

[6] *Ibid.* at p. 420.

[7] *See* Chap. VIII, Part I, C.

[8] *See* Chap. VI, Parts II, III.

[9] *See* Chap. VII, Part I, B and C.

[10] *See* Chaps. I, Part I, and VI, Part IV, A.

[11] *See* Chap. VII, Part II.

[12] *See* Chap VII, Part III.

and *see Imambundee Begum* v. *Sheo Dyal Ram* (1870), 14 W.R., 199; *Ram Gunga Doss* v. *Gobind Chunder Doss* (1871), 16 W.R., 284; *Savalgiapa* v. *Basvanapa* (1873), 10 Bom. H. C., 399.

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With reference to the acquisition of the right by prescription it will be remembered that easements of way are governed by different principles to easements of light and air, the former arising from the uninterrupted user of the servient tenement, the latter by implied covenant on the part of the servient owner derived from the mere occupation of the dominant tenement.[1]

The former are unlawful in their origin. The first of the acts is a trespass; whereas, in the case of light, the acts are in themselves lawful acts, done in the lawful occupation and user of a man's own land.[2]

Easements of way must not be vague or indefinite; that is to say, they must be limited to a particular route over the servient tenement. An easement of way confers no right to wander at pleasure over any part of the servient tenement for whatever purpose.[3]

Easements of way must be definite.

Easements being restrictions of the ordinary rights of property, a right of way is restrictive of a man's right in his soil and of his liberty to enjoy and dispose of his land as he pleases.[4]

Easement of way, how restrictive.

Easements of way do not confer rights to the ownership of the soil.[5] There cannot be a claim to the ownership of land and to a right of way over it at the same time.[6] In the respect of not being rights to the ownership of the soil, private rights of way resemble public rights of way.[7]

Are not rights to ownership of soil.

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[1] *See Cross* v. *Lewis* (1824), 2 B. & C., 686; *Moore* v. *Rawson* (1824), 3 B. & C., 339, referred to with approval in *Webb* v. *Bird* (1863), 13 C. B. N. S., 841, and *see* Part I, *supra*.

[2] *See per* Field, J., in *Dalton* v. *Angus* (1881), 6 App. Cas., 759.

[3] *Gooroo Churn Goon* v. *Gunga Gobind Chatterjee* (1867), 8 W. R., 269; *Joy Doorga Dassia* v. *Juggernath Roy* (1871), 15 W. R., 295; *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), 1 Ch. D., 362; 45 L. J. Ch., 353.

[4] Indian Easements Act, s. 7, App. VII.

[5] *Clifford* v. *Hoare* (1874), 43 L. J. C. P., 225; L. R. 9 C. P., 362; *Sham Churn Auddy* v. *Tarini Churn Banerjee* (1876), 25 W. R., 218; I. L. R., 1 Cal., 422.

[6] *Ibid.*; *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (1907), I. L. R., 34 Cal., 51; XI Cal. W. N., 20. But the claim may be in the alternative, and either of the rights may be established if the other be relinquished, *Ibid.*, overruling *Bijoy Keshub Roy* v. *Obhoy Churn Ghose* (1871), 16 Cal. W. R., 198.

[7] *St. Mary Newington* v. *Jacobs* (1871), L. R., 7 Q. B., 47; 41 L. J. M. C., 72.

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Presumption as to ownership of soil in case of private way.

The presumption with regard to the ownership of the soil is that it belongs *usque ad medium filum viæ* to the owners of the adjoining lands, and such presumption applies equally to a private as to a public road.[1]

Right of way by boat.

There is a similar presumption in India.[2] In India there may be a right of way by boat in the rainy season over a particular channel. Such a right may be acquired by enjoyment for the necessary period in spite of the interruption in the actual user caused by lack of water.[3]

Private right of way may be common to several persons.

A private right of way is not necessarily confined to a way used by one person; it may be common to several persons.[4]

Question whether private and public rights of way can exist simultaneously.

It may be convenient here to consider the question as to whether a private right of way and a public right of way can exist simultaneously over the same soil.

The answer depends on the time at which the two rights come into existence.

If a public right of way already exists, no private right of way can be acquired in derogation of it, but if a private right of way already exists, the public right of way on coming into existence will not extinguish the private right, but will remain qualified to that extent unless there has been a release or abandonment of the private right, or a public user inconsistent therewith.[5]

The right to a private way and the right to a public way over the same soil cannot be pleaded together as the two are inconsistent,[6] but the private right if pre-existing can be relied on, for there is no compulsion in such a case to resort to the public right which might possibly be disputed by conflicting

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[1] *Holmes* v. *Bellingham* (1859), 7 C. B. N. S., 329, and *see* as to public roads, Chap. IV, Part II, A (2).

[2] *Mobaruck Shah* v. *Toofany* (1878), I. L. R., 4 Cal., 206.

[3] *Ramsoondar Burral* v. *Woomakant Chuckerbutty* (1864), 1 W. R., 217; *Koylash Chunder Ghose* v. *Sonatun Baroie* (1881), I. L. R., 7 Cal., 132; 8 C. L. R., 281; and *see infra*, Part III, A, Chap. IV, Part I, B (2) (*a*), Chap. VII, Part II.

[4] *Semple* v. *The London and Birmingham Ry. Co.* (1838), 9 Sim., 209; *Sham Soonder Bhattacharjee* v. *Monee Ram Dass* (1876), 25 W. R., 233.

[5] *Brownlow* v. *Tomlinson* (1840), 1 M. & G. at p. 486; *Duncan* v. *Louch* (1845), 6 Q. B., 904; *Reg.* v. *Chorley* (1848), 12 Q. B., 515.

[6] *Chichester* v. *Lethbridge* (1738), Willes, 71.

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evidence,[1] and the remedy for the obstruction of which is by indictment only unless special damage can be shewn.[2]

When once a right of way has been acquired, the servient owner cannot object to it on the ground of inconvenience, nor can he put an end to the right by shewing that there is another pathway which the dominant owner might use.[3]

Disturbance of private right of way.

In order to maintain an action for the disturbance of a private right of way it is not necessary for the plaintiff to prove special damage.[4]

Burthen of proof of prescriptive way.

The burthen of proving a prescriptive right of way lies on the person who asserts it.[5]

A right of way is a right of use of land within the meaning of section 320 of the Criminal Procedure Code. The exclusive possession of land not subject to such a servitude becomes something short of exclusive possession when the easement arises.[6]

A party who consents to the alteration of an existing path by the Magistrate to one more convenient to the public generally cannot afterwards come forward and claim such right of way as private.[7]

Part III.—Easements in Water.

Nature of easements in natural streams.

The nature of the right conferred by the acquisition of an easement in water is to restrict in some particular respect the

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[1] *Allen* v. *Ormond* (1806), 8 East, 3.

[2] *Chichester* v. *Lethbridge*, *ubi sup.*; *Baijnath Singh* v. *Tetai Chowdhry* (1901), 6 Cal. W. N., 197; *Campbell Davys* v. *Lloyd* (1901), 2 Ch., 518; Pratt and Mackenzie's Law of Highways, 15th Ed., 116, 126, and *see* further Chap. IV, Part II, A (2).

[3] *Sham Bagdee* v. *Fukeer Chand Bagdee* (1866), 6 W. R., 222; *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory* (1874), 22 W. R., 302.

[4] *See Baijnath Singh* v. *Tetai Chowdhry*, *ubi sup.*, and the other cases cited in the same note. Such a rule is applicable only to the disturbance of a highway, which being regarded as a public nuisance, can only be the subject of an indictment unless special damage can be proved by a private individual, in which case he may maintain an action for the private nuisance, *Ibid.* Nor is it applicable to the disturbance of a merely local right of way, *Brockbank* v. *Thompson* (1903), 2 Ch., 344.

[5] *Khoda Bux* v. *Shaikh Tazaddin* (1904), 8 Cal. W. N. 359. As to burthen of proof generally, *see* Chap. V, Part I, and Chap. XI, Part I.

[6] (1868), 4 Mad. H. C. Rulings xi.

[7] *Muddun Gopal Mookerjee* v. *Nilmonee Banerjee* (1869), 11 W. R., 304.

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enjoyment of those natural rights in water which form part of the ordinary incidents of property.[1]

Those natural rights may be described as the right of every riparian proprietor to use the water which flows past his land equally with other proprietors, to have the water come to him undiminished in flow, quantity, and quality, and unaffected in temperature, and to go from him without obstruction.[2]

Modes of acquisition.

Easements in water can arise either by grant, express or implied,[3] by prescription or enjoyment for the necessary period,[4] or by custom,[5] and in India, also under the Indian Limitation Act,[6] and the Indian Easements Act.[7]

Extent of easements in water.

The extent of prescriptive rights in water (except as regards easements to pollute water[8]) is to be measured by the user as proved.[9] Where the easements are acquired by grant, their extent is limited by the terms of the grant.[10]

Classification of easements in water.

It will be convenient to classify the different easements relating to water in accordance with the special nature of the right acquired.

Easements in water are affirmative easements and may be divided into the following classes, that is to say :—

A. Easements relating to the flow of water in natural watercourses.

B. Easements relating to the flow of water in artificial watercourses.

C. Easements relating to the subterranean flow of water.

D. Easements relating to the discharge of rain-water upon adjoining land.

E. Easements relating to taking water from, or conducting water from, or over, the servient tenement.

F. Easements affecting the natural state of water by pollution or alteration of temperature.

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[1] *See* Chap. I, under "Natural Rights," and Chap. V, Part III.

[2] *See* Chap. V, Part III, and Indian Easements Act, s. 7, ill. (*h*), App. VII.

[3] *See* Chap. VI, Parts II and III.

[4] *See* Chap. VII, Part I.

[5] *See* Chap. IV, Part I, B (1).

[6] *See* Chap. VII, Part II.

[7] *See* Chap. VII, Part III.

[8] *See infra*, F, and Chap. VIII, Part I, B (4).

[9] *See* Chap. VIII, Part I, B (4).

[10] *See* Chap. VIII, Part I, B (1).

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A.—Easements relating to the flow of water in natural water-courses.

Easements in natural streams flowing in known and defined channels.

Easements can be acquired in natural streams flowing in known and defined channels.

In this connection are to be noticed those easements that give riparian owners the right to divert water from its accustomed course and thus diminish the quantity which would otherwise descend to the proprietors below, or to throw the water back upon the proprietors above.[1] These rights, being clearly restrictions of the ordinary rights of property,[2] require that the burthen of proof of them should rest upon the proprietor claiming them,[3] for, as was said by Leech, V.C., in *Wright* v. *Howard*,[4] "Either proprietor who claims the right "either to throw the water back above or to diminish the "quantity of water which is to descend below must, in order "to maintain his claim, either prove an actual grant or license "from the proprietor affected by the operations, or must "prove an uninterrupted enjoyment of twenty years."

Wright v. *Howard*.

In *Bealey* v. *Shaw*,[5] Lord Ellenborough said[6]: "The "general rule of law as applied to this subject is, that, "independent of any particular enjoyment used to be had by "another, every man has a right to have the advantage of "a flow of water in his own land without diminution or "alteration. But an adverse right may exist founded on the "occupation of another. And though the stream be either "diminished in quantity or even corrupted in quality, as by "means of the exercise of certain trades, yet if the occupation "of the party so taking or using it have existed for so long a "time as may raise the presumption of a grant, the other

Bealey v. *Shaw*.

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[1] *See Bealey* v. *Shaw* (1805), 6 East, 209; *Wright* v. *Howard* (1823), 1 Sim. & St., 190; 24 R. R., 169; *Embrey* v. *Owen* (1851), 6 Exch. at p. 370; 20 L. J. Exch., 212; *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335; *Debi Pershad Singh* v. *Joynath Singh* (1897), I. L. R., 24 Cal. (P. C.), 865; L. R., 24 Ind. App., 60; *John White & Sons* v. *J. & M. White* (1906), App. Cas., 72.

[2] Indian Easements Act, s. 7, ill. (*h*), App. VII.

[3] *See* Chap V, Part I.

[4] (1823) 1 Sim. & St., 190, 24 R. R., 169.

[5] (1805) 6 East., 208.

[6] *Ibid.* at p. 215.

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"party whose land is below must take the stream subject to "such adverse right. I take it that twenty years' exclusive "enjoyment of the water in any particular manner affords a "conclusive presumption of the right in the party so enjoying "it, derived from grant or act of Parliament." [1]

The facts in *Bealey* v. *Shaw* [2] were that the defendant and his predecessors in title had been accustomed for over sixty years to divert water from the River *Irwell* by means of a weir of a given height, and a sluice of given dimensions. In this state of things the plaintiff came to a spot lower down the river, erected a weir, mill, and other works on his own land, and commenced to enjoy the natural rights in respect of so much of the water as the defendant had not been accustomed to divert. The defendant subsequently enlarged his sluice, and the question arose whether he had a right to do so.

It was held that in the absence of enjoyment, for the necessary period, of the enlarged sluice the defendant was confined to his original easement, and could claim nothing more.

No right by way of easement to all the water of a running stream.

John White & Sons v. *J. & M. White.*

But though easements may thus be acquired in natural streams there cannot by grant or prescription be an exclusive right to all the water of a running stream.[3]

Thus in *John White & Sons* v. *J. & M. White*,[4] it was held that the ownership of an artificial dam, although it may give a right to maintain the dam, does not turn the running stream into a pond so as to confer upon the owner of the dam an exclusive right to use the whole of the running water.

In India, as in England, the right to divert and impound so much of the water of a natural stream as may be required for purposes of irrigation,[5] or, in case of ordinary floods, to protect lands by the erection of bunds whereby the water is

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[1] *See* Chaps. VI and VII. But a prescriptive right to the use of all the running water is incapable of acquisition, *John White & Sons* v. *J. & M. White*, *ubi sup.*

[2] *Ubi sup.*

[3] *John White & Sons* v. *J. & M. White* (1906), App. Cas., 72.

[4] *Ubi sup.*

[5] *Debi Pershad Singh* v. *Joy Nath Singh* (1897), I. L. R., 24 Cal. (P. C.) at p. 874; L. R., 24 Ind. App. at p. 68; and *see Babu Chumroo Singh* v. *Mullick Khyret Ahmed* (1872), 18 W. R., 525; *Kalu Khabir* v. *Jan Meah* (1902), I. L. R., 29 Cal., 100; *Eshan Chandra Samanta* v. *Nil Moni Singh* (1908), I. L. R., 35 Cal., 851.

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thrown on to lands of other riparian owners to their injury,[1] can only be acquired as an easement either under contract with the lower riparian owner or by prescription, or, possibly, by custom.[2]

Dominant tenement must abut on stream.

It is important to remember that the obstruction or diversion of water for the necessary period must be to a tenement abutting on the stream. Otherwise no easement will be acquired.[3]

No right acquired by servient owner that the exercise of the easement shall be continued.

With reference to this topic an important question arises as to whether a servient owner whose natural rights have been restricted by the diversion of water from its natural course, or by the discharge of water on to his land, can require the dominant owner to continue the exercise of the easement, or, in other words, whether he thereby acquires a reciprocal easement as against the dominant owner that the latter shall continue the diversion or discharge of the water.

The question has been fully discussed in the Courts, and it has been decided that the servient owner cannot acquire any such right.[4]

The principles established in the decisions proceed upon two grounds, first, upon the ground that the enjoyment of the servient owner would be incapable of interruption at the hands of the dominant owner by any reasonable mode,[5] and secondly, upon the broader ground, that it is of the essence of an easement that it exists for the benefit of the dominant tenement alone, and that the servient owner can acquire no right to insist on the exercise of the easement on the part of the dominant owner if the latter finds it expedient to abandon the right.[6]

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[1] *Venkatachalam Chettiar* v. *Jemindar of Sivagunga* (1904), I. L. R., 27 Mad., 409 (413).

[2] *Eshan Chandra Samanta* v. *Nil Moni Singh*, *ubi sup.*

[3] *Stockport Water Works Co.* v. *Potter* (1864), 3 H. & C., 300.

[4] *Arkwright* v. *Gell* (1839), 5 M. & W., 203; *Wood* v. *Waud* (1849), 3 Exch., 748; *Mason* v. *Shrewsbury and Hereford Ry. Co.* (1871), L. R., 6 Q. B., 578; 40 L. J. Q. B., 293; *Khoorshed Hossein* v. *Teknarain Sing* (1878), 2 C. L. R., 141; and *see* Indian Easements Act, s. 50, App. VII, and *supra*, Chap II.

[5] *Arkwright* v. *Gell*; *Wood* v. *Waud*, and *see* the judgment of Blackburn, J., in *Mason* v. *Shrewsbury and Hereford Ry. Co.*

[6] *See* the judgment of Cockburn, C.J., in *Mason* v. *Shrewsbury and Hereford Ry. Co.*

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Arkwright v. *Gell.*

The first-mentioned ground was elucidated by Lord Abinger, C.B., in *Arkwright* v. *Gell*.[1]

In that case the plaintiff sued to recover damages from the defendants for the diversion by them of a portion of the water flowing to certain cotton mills erected by the plaintiff, from a mineral sough constructed by a company of adventurers for the drainage of a mineral field under license from the mine owners. Subsequently to the construction of this mineral sough another company composed of the defendants commenced the construction of another sough on a lower level for the purpose of draining a larger portion of the mineral field under a similar license from the same mine owners who had previously used the former sough, and the result of their operations was to cause the diversion complained of. The judgment of the Court of Exchequer Chamber was delivered by Lord Abinger, C.B., who, in dismissing the action, pointed out that the acquisition of such a right as was claimed by the plaintiff would depend on the capability of submission on the part of the defendants, as dominant owners, to the enjoyment of the water by the plaintiff as servient owner, and that as there was no reasonable mode of interruption open to the defendants, there could be no submission on their part, and therefore no acquisition of the right by the plaintiff. The futility of the plaintiff's case becomes all the more apparent when it is considered that the acquisition of the right claimed by him would have imposed an obligation on the mine owners not to work their mines by the ordinary mode of getting minerals, and been founded on a mode of prevention of the plaintiff's enjoyment of the stream, not only highly expensive and inconvenient to the mine owners, but absolutely destructive to their interests.

Wood v. *Waud.*

In *Wood* v. *Waud*[2] the Court expressed itself satisfied that the principles laid down in *Arkwright* v. *Gell*, as applicable to the particular matter now under discussion, were correct. Pollock, C.B., in the course of his judgment, used the following argument in explaining the legal position in such a case as the

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[1] *Ubi sup.*

[2] (1849) 3 Exch., 748.

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present. He said[1]: "The flow of water of twenty years from "the eaves of a house could not give a right to the neighbour "to insist that the house should not be pulled down or altered, "so as to diminish the quantity of water flowing from the "roof. The flow of water from a drain for the purposes of "agricultural improvements, for twenty years, could not give "a right to the neighbour so as to preclude the proprietor "from altering the level of the drains for the greater improve- "ment of the land. The state of circumstances in such cases "shews that one party never intended to give, nor the other "to enjoy, the use of the stream as a matter of right."

Acquisition of easements in natural but intermittent streams.

If easements can be acquired in natural streams flowing in known and defined channels is it essential to the acquisition of such rights that the streams should be flowing perpetually? Would any intermission in the flow prevent the acquisition of the easements? The cases of *Trafford* v. *The King*,[2] and *Drewett* v. *Sheard*,[3] point to the conclusion that where the stream has a permanent and natural origin, and flows in a defined channel, but at any point of its course assumes a character which renders its existence dependent upon the recurrence of floods at certain seasons, as in the case of an overflow, or on the doing of any act regulating the supply of water at its source, it may become the subject of easements.

Trafford v. *The King*. *Drewett* v. *Sheard*.

Trafford v. *The King* was the case of a watercourse caused by overflow water from a brook in times of flood.

In *Drewett* v. *Sheard* Littledale, J., said there was no objection to enjoying the benefit of water which flowed into a ditch from a natural stream at all times or only at such times as the stream was swollen by water let by means of sluices into the river with which the stream communicated.

The principle in these cases that any intermission in the subject of the easement beyond the control of the dominant owner does not prevent the acquisition of the right, appears to find its analogy in cases arising in India, where the dominant

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[1] *Ibid.* at p. 778.

[2] (1832) 8 Bing., 204; 34 R. R., 680.

[3] (1836) 7 C. & P., 465.

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owner has a right of way by boat over his neighbours' tank or through definite channels exercisable during the rainy season only by reason of the quantity of water required.[1]

No easements in intermittent artificial streams.

But easements cannot be acquired in artificial streams, if intermittent, at any rate against the person creating them.[2]

B.—Easements relating to the flow of water in artificial watercourses.

Easements in artificial watercourses.

The right to water flowing through *artificial* watercourses is a right of easement, and must rest on some grant or arrangement, either proved or presumed, from, or with, the owners of the lands from which the water is artificially brought, or on some other legal origin.[3]

It is quite distinct from the natural right which, as a natural incident to the ownership of land, entitles *primâ facie* each successive riparian proprietor to the unimpeded flow of water of a *natural* channel in its *natural* course, and to its reasonable enjoyment as it passes through his land.[4]

But the circumstances in any case may be such as to warrant the inference that when the watercourse was originally constructed, it was agreed that each of the riparian proprietors should have the same rights as the riparian proprietors upon a natural stream; though, even when this is the case, it is possible that the general rights of the riparian proprietors may be subject to some special or larger right acquired by one of

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[1] *See Koylas Chunder Ghose* v. *Sonatun Chung Barooie* (1881), I. L. R., 7 Cal., 132; 8 C. L. R., 281; and *supra*, Part II, and *infra*, Chap. IV, Part I, B 2 (*a*), and Chap. VII, Part II.

[2] *See infra*, B.

[3] *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46; *Rameshur Prasad Narain Singh* v. *Koonj Behari Pattuk* (1878), 4 App. Cas., 121; L. R., 6 Ind. App., 33; I. L. R., 4 Cal., 633; and *see Kensit* v. *Great Eastern Railway Co.* (1884), 27 Ch. D. at p. 134; *Baily & Co.* v. *Clark, Son & Morland* (1902), 1 Ch., 649; *Badhu Mandal* v. *Maliat Mandal* (1903), I. L. R., 30 Cal., 1077; *Krista Das Chowdhry* v. *Joy Narain Panja* (1904), 8 Cal. W. N., 158.

[4] *Rameshur Prasad Narain Singh* v. *Koonj Behari Pattuk*; *Kensit* v. *Great Eastern Railway Co.*, *ubi sup.*, and *see* Chap. V, Part III, A.

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themselves either by the original grant or by subsequent user.[1]

In India the law of easements, as relating to artificial watercourses, has been frequently applied to the subject of irrigation, a method largely employed in most parts of the country for the purposes of cultivation. Artificial channels in connection with irrigation.

It may be useful, therefore, to study closely some of the cases that have occurred in India connected with this branch of the law. Indian cases.

In *Ponnusawmi Tevar* v. *Collector of Madura*,[2] the plaintiff sued to establish his right to an uninterrupted flow of water through a channel which ran into a tank, the property of the plaintiff, and to compel the removal of sluices erected across the said channel by the first defendant's predecessor in office, and used for the purpose of diverting the flow of water. *Ponnusawmi Tevar* v. *Collector of Madura.*

The first Court dismissed the suit, but, on appeal, the Madras High Court reversed that decision and gave judgment for the plaintiff.

The High Court,[3] in discussing the nature of the right claimed and the manner of its acquisition, expressed the opinion that the right claimed was in an artificial stream, and that the plaintiff to succeed must shew he possessed an easement. In deciding that the plaintiff had acquired such an easement the Court said[4]: "I think that the circumstances in "evidence justify the inference that the right claimed has "been gained by the plaintiff; the conduct of the Government "shewing as it seems to me that the water has been allowed "to flow to the plaintiff's village and other villages on the "understanding that it was to continue to flow on for the "exclusive use and benefit of these villages and not be liable "to obstruction or suffer diminution for the advantage of other "district villages."

"I quite admit that the Government of this country has at

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[1] *Baily & Co.* v. *Clark, Son & Morland*, *ubi sup.*

[2] (1869) 5 Mad. H. C., 6.

[3] Scotland, C.J., and Innes, J.

[4] *Per* Innes, J., at p. 29.

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"all times assumed to itself and has the right in the interests "of the public to regulate the distribution for use of any "portion of the water flowing in the natural channels in which "rights have not as yet been acquired, and to this extent, the "claim of the first defendant on behalf of the Government "cannot be gainsaid. But where a channel has been con- "structed by Government acting as the agent of the community "to increase the well-being of the country by extending the "benefit of irrigation, and in pursuance of that purpose a flow "of water is directed to the villages designed to be benefited, "it becomes simply a question upon the circumstances of the "case whether there has not been a conveyance to such "villages in perpetuity of a right to the unobstructed flow of "water by the channel. Looking at the permanency of such "works and to the permanency attaching to the object, that "there was a transfer in perpetuity would seem an almost "necessary conclusion, unless there were other circumstances "to lead to one of an opposite character. It might of course "be capable of being shewn that the privilege was granted as "a mere license, and that before the water was allowed to flow "to the villages, it had been left open to Government by "arrangements then made to obstruct the flow at will at any "future period. In the case before us, however, nothing of "the kind is apparent."

Morgan v. *Kirby.*

In *Morgan* v. *Kirby*,[1] the plaintiff sought to restrain the defendant from interfering with, and diverting, the flow of water through an artificial channel opened by the plaintiff for the conveyance of water for the use of his tea estate. The Court decided that the right claimed was an easement and that the plaintiff was entitled to the uninterrupted flow of water as claimed subject to the defendant's right to make reasonable use of it as it flowed through his grounds.

Rameshur Prasad Narain Singh v. *Koonj Behari Pattuk.*

In *Rameshur Prasad Narain Singh* v. *Koonj Behari Pattuk*,[2] the appellant claimed an alleged ancient right as against

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[1] (1878) I. L. R., 2 Mad., 46.

[2] (1878) I. L. R., 4 Cal., 633; 4 App. Cas., 121; L. R., 6 Ind. App., 33.

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the respondents, his neighbouring proprietors, to have certain of his villages, five in number, irrigated out of a "tâl" or artificial reservoir of water existing on the respondents' land, and he further sued to have certain dams erected, and channels of water cut, by the respondents removed and filled up, and to have a channel by which he alleged he had been in the habit of receiving water for irrigation reopened, and the respondents perpetually restrained from wasting the waters of their "tâl" or from even discharging its waters except towards the appellant's villages and in that particular channel. The respondents, in substance, resisted the appellant's claim on the ground that the "tâl" in question was kept up by them on their own land for their own irrigation, and was supplied by "collected rain-water" which ran into it, and that they were entitled to use that water for their own benefit, and that the appellant had no such right as he claimed.

It was held by the Privy Council that the appellant's legal right to the enjoyment of water flowing from an artificial reservoir through an artificial watercourse should be presumed from the circumstances under which the same were presumably created and actually enjoyed, subject to the respondents' right to the use of the water for the purpose of irrigating their lands by proper and requisite channels and other proper means.

The Privy Council treated as clearly established the distinction between the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it though an artificial watercourse.

Their Lordships referred with approval to the principle established in *Wood* v. *Waud*[1] and other cases that the acquisition of the right to water flowing in an artificial channel as against the originator depends upon the permanency of the channel, and they found that the character of the reservoir and watercourse in dispute, and the circumstances under which they were presumably created and actually enjoyed indicated that a permanent and connected system of irrigation for the

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[1] (1849) 3 Exch. 748.

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appellant's and respondents' mouzahs beneficial to both estates was by those means provided.

They were of opinion that it was not correct to insert in the decree, as the first Court had done, a declaration of the appellant's right to scour the channel through which the water from the reservoir flowed. They observed that *primâ facie* and in the absence of evidence to the contrary, such a right is presumed by law to be incident to the right to the flow of water,[1] but no issue was raised on that point, nor did it appear that any effort of the appellant to cleanse the watercourse had been obstructed by the respondent.

Madhub Das Bairagi v. *Jogesh Chunder Sarkar.*

In *Madhub Das Bairagi* v. *Jogesh Chunder Sarkar*,[2] it was held in reliance on *Rameshur Prasad Narain Singh* v. *Koonj Behari Pattuk*, that the enjoyment by the plaintiff and his predecessors in title from time immemorial for the purposes of irrigation of the water of a tank which flowed through openings in the tank into two channels, raised the presumption of a legal origin, and that the plaintiff was entitled to the use of the water accordingly.

Badhu Mandal v. *Maliat Mandal.*

In *Badhu Mandal* v. *Maliat Mandal*,[3] it was decided that the right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation may be gained as an easement by prescription.

Krista Das Chowdhry v. *Joy Narain Panja.*

And in *Krista Das Chowdhry* v. *Joy Narain Panja*,[4] it was held that user for twenty years of the water drawn from a tank for irrigating adjacent land gives the owner of the land a right of easement, although the methods of withdrawing the water may vary within such period, and that the owner of the land has a right to sue even if the land be in occupation of his tenant.

Acquisition of easement as against originator of artificial watercourse.

A prescriptive right to the uninterrupted flow of water in artificial channels cannot be acquired as against the party creating them unless the channel is permanent.[5]

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[1] *See* Chap. VIII, Part II.
[2] (1903) I. L. R., 30 Cal., 281.
[3] (1903) I. L. R., 30 Cal., 1077.
[4] (1904) 8 Cal. W. N., 158.
[5] *Arkwright* v. *Gell* (1839), 5 M. & W., 203; *Wood* v. *Waud* (1849), 3 Exch., 748; *Rameshur Prasad Narain Singh* v. *Koonj Behari Pattuk* (1878), I. L. R., 4 Cal., 633; 4 App. Cas., 121; L. R., 6 Ind. App. 33.

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In *Wood* v. *Waud*[1] the Court said: "We entirely concur *Wood v. Waud.*
"with Lord Denman, C.J., that 'the proposition, that a water-
"'course, of whatever antiquity, and in whatever degree enjoyed
"'by numerous persons, cannot be enjoyed so as to confer a
"'right to the use of the water, if proved to have been originally
"'artificial, is quite indefensible;' but, on the other hand, the
"general proposition, that *under all circumstances*, the right to
"watercourses arising from enjoyment, is the same whether
"they be natural or artificial, cannot possibly be sustained.
"The right to artificial watercourses, as against the party
"creating them, surely must depend upon the character of
"the watercourse, whether it be of a permanent or temporary
"nature, and upon the circumstances under which it is
"created. The enjoyment for twenty years of a stream
"diverted or penned up by permanent embankments, clearly
"stands upon a different footing from the enjoyment of a flow
"of water originating in the mode of occupation or alteration
"of a person's property, and presumably of a temporary
"character, and liable to variation."

In *Greatrex* v. *Hayward*,[2] Baron Parke shortly stated the *Greatrex v. Hayward.*
principle to be that the right of a party to an artificial water-course, as against the party creating it, must depend upon the character of the watercourse, and the circumstances under which it was created.[3]

And in the recent case of *Baily & Co.* v. *Clark, Son & Morland*,[4] it was said that in considering a claim to the exclusive use of water flowing along an artificial channel the Court should take into account first the character of the watercourse, whether it is temporary or permanent; secondly, the circumstances under which it was presumably created; and thirdly, the mode in which it has been in fact used and enjoyed.[5] *Baily & Co. v. Clark, Son & Morland.*

The facts in *Arkwright* v. *Gell*[6] shewed that the artificial

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[1] *Ubi sup.* at p. 777.
[2] (1853) 8 Exch., 293.
[3] And *see Burrows* v. *Lang* (1901), 2 Ch., 502 (507).
[4] (1902) 1 Ch., 649.
[5] *Ibid.*, *per* Stirling, L.J., at p. 668.
[6] (1839) 5 M. & W., 203.

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channel there in question was of a purely temporary character, having its continuance only whilst the convenience of the mine owners required it.

And an underground sough or drain made for the purpose of carrying water off land for its better cultivation and subject to occasional stoppage by the roots of trees or otherwise, is clearly a watercourse of a temporary nature only.[1]

But in every case the question whether a stream is permanent or temporary depends upon the circumstances under which it was created and the intention of the party creating it.[2]

Rule of permanency is not applicable to riparian proprietors *inter se.*

The rule that an artificial stream must be permanent for the acquisition of an easement therein as against its originator, is not applicable to riparian proprietors *inter se.*

Arkwright v. *Gell.*

Arkwright v. *Gell* is an authority for the proposition that the right to the uninterrupted flow of water in artificial streams can be acquired against the person through whose land the stream flows, whether the stream be *permanent* or *temporary*.[3]

Good against Government.

An easement in an artificial watercourse is as good against Government as against a private individual.[4]

Defined channel necessary to acquisition by prescription of easement in water.

It is settled law both in India and England that water must flow in a defined channel, whether natural or artificial, to become the subject of an easement by prescription.[5]

Surface drainage water.

In this connection the case of surface drainage-water is of considerable importance in relation to agriculture.

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[1] *Greatrex* v. *Hayward* (1853), 8 Exch., 293.

[2] *Wood* v. *Waud* (1849), 3 Exch., 748; *Greatrex* v. *Hayward* (1853), 8 Exch., 293; *Beeston* v. *Weate* (1856), 5 E. & B., 986; 25 L. J. Q. B., 115; and *see Rameshur Prqsad Narain Singh* v. *Koonj Behari Pattuk* (1878), I. L. R., 4 Cal., 633; 4 App. Cas., 121; L. R., 6 Ind. App., 33; *Burrows* v. *Lang* (1901), 2 Ch., 502.

[3] (1839) 5 M. & W. at p. 233, *per* Lord Abinger, C.B.

[4] *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6.

[5] *Rawstron* v. *Taylor* (1855), 11 Exch., 369; 25 L. J. Exch., 33; *Broadbent* v. *Ramsbotham* (1856), 11 Exch., 603; 25 L. J. Exch., 115; *Kena Mahomed* v. *Bohatoo Sircar* (1863), Marsh., 506; *Inam Ali* v. *Poresh Mandal* (1882), I. L. R., 8 Cal., 468; *Perumal* v. *Ramasami* (1887), I. L. R., 11 Mad., 16; Indian Easements Act, s. 17, App. VII. But surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise may be the subject of an express grant or contract, *Perumal* v. *Ramasami*, *ubi sup.*

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Every landowner has a natural right to deal with his surface drainage-water as he pleases.[1] He can either let it find its way to his neighbour's land if that is at a lower level than his own,[2] or he can collect it or use it as he pleases on his own land,[3] subject always to the reservation that if he allows it to flow for the prescriptive period through defined and artificial channels on to his neighbour's land, his neighbour will acquire a right to its continuance,[4] and, conversely, if he enjoys a right of outlet for his surplus water for over twenty years through defined artificial channels, he will acquire a right to the continuance of the outlet.[5]

But if drainage-water, whether caused by rainfall,[6] or from oozings of a spring,[7] or from the overflow of a well,[8] does not follow any defined channel, but percolates through and flows over the surface, it is considered in law too vague and indefinite a thing to be made the foundation of a prescriptive right.[9]

Thus, where a prescriptive right was claimed to have water arising from surface drainage off the defendant's land thrown back from the bund bounding the plaintiff's tank on to the defendant's land and kept there until required for use, it was decided there could be no prescriptive right for such an object.[10]

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[1] *Rawstron* v. *Taylor*; *Broadbent* v. *Ramsbotham*; *Robinson* v. *Ayya Krishnama* (1872), 7 Mad. H. C., 37.

[2] *Smith* v. *Kenrick* (1849), 7 C. B., 468; *Kali Pooree* v. *Manick Sahoo* (1873), 20 W. R., 287; *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335; *Imam Ali* v. *Poresh Mandal* (1882), I. L. R., 8 Cal., 468; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas., 696, 697, 761; and *see* Indian Easements Act, s. 7, ill. (*i*), App. VII.

[3] *Rawstron* v. *Taylor*; *Broadbent* v. *Ramsbotham*; *Perumal* v. *Ramasami*, *ubi sup.*

[4] *Kena Mahomed* v. *Bohatoo Sircar*, *ubi sup.*

[5] *Imam Ali* v. *Poresh Mandal*, *ubi sup.*; *Bidhu Bhusan Palit* v. *Beny Madhub Mozumdar* (1904), 8 Cal. W. N., 244.

[6] *Kena Mahomed* v. *Bohatoo Sircar* *ubi sup.*; and *see Robinson* v. *Ayya Krishnama*, *ubi sup.*

[7] *Rawstron* v. *Taylor*, *ubi sup.*

[8] *Broadbent* v. *Ramsbotham*, *ubi sup.*

[9] *Kena Mahomed* v. *Bohatoo Sircar*; *Robinson* v. *Ayya Krishnama*; *Perumal* v. *Ramasami*; *Rawstron* v. *Taylor*; *Broadbent* v. *Ramsbotham*; *Bhusan Palit* v. *Beny Madhub Mozumdar*, *ubi sup.*

[10] *Robinson* v. *Ayya Krishnama*, *ubi sup.*; and *see Perumal* v. *Ramasami*, *ubi sup.*

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Alienation of rights in artificial watercourses.

The alienation of rights to the flow of water in artificial watercourses is governed by the same principles as the alienation of rights in natural streams, whether such last-mentioned rights be natural rights or easements.[1] This subject will be found fully dealt with in connection with the law relating to natural rights.[2]

C.—Easements relating to the subterranean flow of water.

No easements in water flowing underground in unknown channels.

This branch of the law of easements applies to underground springs, streams, watercourses, and percolations, and makes it necessary to consider whether water flowing underground is on the same footing as water flowing above ground, and whether, if easements can be acquired in the latter case, they can also be acquired in the former.

Acton v. *Blundell.*

In this respect the case of *Acton* v. *Blundell*[3] which has settled the law in regard to natural rights to underground water is an important guide. The Court of Exchequer Chamber decided that a man has no natural right to water under his own ground, whether collected in a well or passing through springs or streams flowing in no defined or known course, and that any diminution of such water by his neighbour can be treated only as *damnum absque injuriâ*, and gives no ground of action. In that case the plaintiff declared in the first count for the disturbance of the right to the water of certain underground springs, streams, and watercourses, which, as he alleged, ought of right to run, flow, and percolate into the closes of the plaintiff, for supplying certain mills with water; and in the second count for the draining off the water of a certain spring or well of water in a certain close of the plaintiff by reason of the possession of which close, as he alleged, he ought of right to have the use, benefit, and enjoyment of the water of the said well for the convenient use of his close. The plaintiff proved that less than twenty years before the commencement of the suit, a former owner and occupier of certain

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[1] *See* Gale on Easements, 8th Ed., p. 311.

[2] *See* Chap. V, Part III, D.

[3] (1843) 12 M. & W., 324.

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land and a coffee mill now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill, and that the defendants had subsequently sunk a coal pit in the land of one of the defendants at about three-quarters of a mile from the plaintiff's well, and about three years after sunk a second at a somewhat less distance; the consequence of which sinkings was, that by the first, the supply of water was considerably diminished, and, by the second, was rendered altogether insufficient for the purposes of the mill.

Tindal, C.J., who delivered the judgment of the Court, said:[1] "The question argued before us has been in substance "this: whether the right to the enjoyment of an underground "spring, or of a well supplied by such underground spring, is "governed by the same rule of law as that which applies to, "and regulates, a watercourse flowing on the surface. The "rule of law which governs the enjoyment to a stream flowing "in its natural course over the surface of land belonging to "different proprietors is well established. Such proprietor of "the land has a right to the advantage of the stream flowing "in its actual course over his land, to use the same as he "pleases for any purposes of his own not inconsistent with a "similar right in the proprietors of the land above or below; "so that neither can any proprietor above diminish the "quantity or injure the quality of the water which would "otherwise naturally descend, nor can any proprietor below "throw back the water without the license or the grant of "the proprietor above."

"The law is laid down in these precise terms by the Court "of King's Bench in the case of *Mason* v. *Hill*,[2] and sub-"stantially is declared by the Vice-Chancellor in the case of "*Wright* v. *Howard*,[3] and such we consider a correct exposition "of the law. And if the right to the enjoyment of under-"ground springs, or to a well supplied thereby, is to be

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[1] *Ibid.* at p. 348.

[2] (1833) 5 B. & Ad., 1; 2 Nev. & Man., 747.

[3] (1823) 1 Sim. & St., 190.

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"governed by the same law, then undoubtedly the defendants "could not justify the sinking of the coal pits, and the decision "given by the learned Judge would be wrong. But we think, "on considering the grounds and origin of the law which is "held to govern running streams, the consequences which "would result if the same law is made applicable to springs "beneath the surface, and, lastly, the authorities to be found "in the books, so far as any inference can be drawn from them "bearing on the point now under discussion, that there is a "marked and substantial difference between the two cases, and "that they are not to be governed by the same rule of law."

The learned Chief Justice, after observing that the ground and origin of the law relating to streams running in their natural course rests upon the publicity and notoriety of the right, upon long continued and uninterrupted enjoyment, and upon either the implied assent and agreement of the proprietors of the different lands from all ages or on the rights themselves being an incident to the land, proceeds as follows: "But in the case of a well sunk by a proprietor in his own "land, the water which feeds it from a neighbouring soil does "not flow openly in the sight of the neighbouring proprietor, "but through the hidden veins of the earth beneath its sur-"face. No man can tell what changes these underground "sources have undergone in the progress of time. It may well "be that it is only yesterday's date, that they first took the "course and direction which enabled them to supply the well. "Again, no proprietor knows what portion of water is taken "from beneath his own soil, how much he gives originally, "or how much he transmits only, or how much he receives: "on the contrary, until the well is sunk, and the water col-"lected by draining into it, there cannot properly be said, with "reference to the well, to be any flow of water at all. In the "case, therefore, of the well there can be no ground for im-"plying any mutual consent or agreement, for a year past, "between the owners of the several lands beneath which the "underground springs may exist, which is one of the founda-"tions on which the law as to running streams is supposed

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"to be built; nor, for the same reason, can any trace of a "positive law be inferred from long-continued acquiescence "and submission, whilst the very existence of the underground "springs or of the well may be unknown to the proprietors of "the soil."

"But the difference between the two cases with respect to "the consequences, if the same law is to be applied to both, is "still more apparent. In the case of the running stream, the "owner of the soil merely transmits the water over its surface; "he receives as much from his higher neighbour as he sends "down to his neighbour below; he is neither better nor worse; the level of the water remains the same."

"But if the man who sinks the well in his own land can "acquire by that act an absolute and indefeasible right to the "water that collects in it, he has the power of preventing his "neighbour from making any use of the spring in his own "soil which shall interfere with the enjoyment of the well."

"He has the power, still further, of debarring the owner "of the land in which the spring is found, or through which it "is transmitted, from draining his land for the proper cultiva-"tion of the soil; and thus, by an act which is voluntary on "his part, and which may be entirely unsuspected by his "neighbour he may impose on such neighbour the necessity of "bearing a heavy expense, if the latter has erected machinery "for the purpose of mining, and discovers when too late, that "the appropriation of water has already been made. Further, "the advantage on the one side, and the detriment to the "other may bear no proportion. The well may be sunk to "supply a cottage, or a drinking place for cattle; whilst the "owner of the adjoining land may be prevented from winning "metals and minerals of inestimable value, and lastly, there is "no limit of space within which the claim of right to an "underground spring can be confined; in the present case "the newest coal pit is at the distance of half a mile from the "well; it is obvious the law must equally apply if there is an "interval of many miles. Considering, therefore, the state of "circumstances upon which the land is grounded in the one

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"case to be entirely dissimilar from that which exist in the "other; and that the application of the same rule to both "would lead, in many cases, to consequences at once unreason- "able and unjust; we feel ourselves warranted in holding, "upon principle, that the case now under discussion does not "fall within the rule which obtains as to surface streams, nor "is it to be governed by analogy therewith. . . ."

"It is scarcely necessary to say, that we intimate no "opinion whatever as to what might be the rule of law, if "there had been an uninterrupted user of the right for more "than the last twenty years; but, confining ourselves strictly "to the facts stated in the bill of exceptions, we think the "present case, for the reasons above given, is not to be "governed by the law which applies to rivers and flowing "streams, but that it rather falls within that principle, which "gives to the owner of the soil all that lies beneath its surface; "that the land immediately below is his property, whether it "be solid rock, or porous ground, or venous earth, or part soil, "part water; that the party who owns the surface may dig "therein and apply all that is there found to his own purposes "at his free will and pleasure; and that if, in the exercise of "such right, he intercepts or drains off the water collected "from underground springs in his neighbour's well, this "inconvenience to his neighbour falls within the description "of *damnum absque injuriâ*, which cannot become the ground "of an action."

Although the Court expressed no opinion as to what would have been the legal result if the plaintiff could have shewn user of the right claimed for more than the past twenty years, the reasoning of the Chief Justice seems clearly to militate against the acquisition of an easement in such circumstances.

The concealment of the sources of underground water and of the course and channels in which it may flow, the possibility of its percolations in numberless unascertained directions, the impossibility of telling what changes in the underground sources may take place from time to time, the ignorance of the landowner as to how much water he receives and how

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much is taken away from him by adjoining landowners, the difficulty or impossibility consequent upon all these circumstances, of any interruption on the part of the proprietor against whom the right might be claimed, are all cogent arguments against the acquisition of an easement in the flow of underground water.

This principle to be inferred from *Acton* v. *Blundell*[1] has since been expressly established by the House of Lords in the leading case of *Chasemore* v. *Richards*.[2] *Chasemore* v. *Richards.*

There the facts were that the plaintiff was the occupier of an ancient mill on the River *Wandle* and that for more than sixty years, before the action, he and his predecessors had used and enjoyed as of right the flow of the river for the purpose of working their mill.

The River *Wandle* had always been supplied above the plaintiff's mill, in part, by the water produced by the rainfall on a district of many thousand acres in extent comprising the town of *Croydon* and its vicinity. The water of the rainfall sank into the ground to various depths and then flowed and percolated through the strata to the River *Wandle*, part of it rising to the surface, and part of it finding its way underground in continually changing courses.

The defendant represented the Local Board of Health at *Croydon* who, for the purpose of supplying the town of *Croydon* with water, and for other sanitary purposes, sank a well in their own land in the town of *Croydon*, and about a quarter of a mile from the River *Wandle*, and pumped up large quantities of water from their well for the supply of the town of *Croydon* and thereby diverted and abstracted the underground water that would have flowed and found its way into the River *Wandle*, and so to the plaintiff's mill.

The substance of the plaintiff's claim was that after a possession of twenty years he was absolutely entitled to all the water which he had been accustomed to use at his mill, from whatever sources derived, whether passing through

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[1] (1843) 12 M. & W., 324.

[2] (1859) 7 H. L. C., 349.

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known and defined channels above the surface of the ground, or passing through unknown and undefined channels underground.

The Lord Chancellor (Lord Chelmsford) proposed for the opinion of the judges the question whether, in the circumstances of the case, the Croydon Local Board of Health was "legally liable to the action of the appellant for the abstraction of the water in the manner described." The answer of the judges was unanimously in the negative.

It will be convenient to cite *verbatim* certain passages in the judgment of the judges delivered by Mr. Justice Wightman on one of the most important questions that ever came under the consideration of a Court of Justice :—

"The law respecting the right to water flowing in definite "visible channels may be considered as pretty well settled by "several modern decisions, and is very clearly enunciated in "the judgment of the Court of Exchequer in the case of "*Embrey* v. *Owen*."[1]

"But the law, as laid down in these cases, is inapplicable "to the case of subterranean water not flowing in any definite "channel, nor indeed at all, in the ordinary sense, but "percolating or oozing through the soil, more or less, according "to the quantity of rain that may chance to fall."

After a review of the authorities the judgment proceeds : "In such a case as the present, *is any right derived from the "use of the water of the River Wandle for upwards of twenty "years for working the plaintiff's mill?* Any such right against "another, founded upon length of enjoyment, is supposed to "have originated in some grant which is presumed from the "owner of what sometimes is called the servient tenement."

"But what grant can be presumed in the case of percolating waters, depending upon the quantity of rain falling or "the natural moisture of the soil, and in the absence of any "visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water

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[1] (1851) 6 Exch., 353; 20 L. J. Exch., 212.

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"percolating in and out of the defendant's or any other land? "The presumption of a grant only arises where the person "against whom it is to be raised might have prevented the "exercise by the subject of the presumed grant; but how could "he prevent or stop the percolation of water? The Court of "Exchequer, indeed, in the case of *Dickinson* v. *The Grand* "*Junction Canal Co.*,[1] expressly repudiates the notion that such "a right as that in question can be founded on a presumed "grant, but declares that with respect to running water it is "*jure naturæ*. If so, *a fortiori*, the right, if it exists at all, in "the case of subterranean percolating water, is *jure naturæ*, "and not by presumed grant, and the circumstance of the mill "being ancient would in that case make no difference."[2]

The question is then discussed as to whether there was any *natural right* in the plaintiff to prevent the defendant from committing the act complained of. The judges repudiated the notion that there could be any such natural right on the ground that it was impossible to reconcile such a right with the natural and ordinary right of landowner or to fix any reasonable limits to the exercise of such a right.

The judgment concludes with these words: "Such a right "as that claimed by the plaintiff is so indefinite and unlimited "that, unsupported as it is by any weight of authority, we do "not think that it can be well founded, or that the present "action is maintainable; and we therefore answer your Lord- "ship's question in the negative."

This answer of the judges was accepted by the House of Lords.

The result of *Chasemore* v. *Richards* has been to establish beyond all doubt that the principles regulating the rights of landowners in water flowing in known and defined channels,

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[1] (1852) 7 Exch., 282.

[2] *Chasemore* v. *Richards*, though, to this qualified extent, in agreement with *Dickinson* v. *The Grand Junction Canal Co.* (1852), 7 Exch., 252, altogether dissents from its proposition that a natural right can exist in the case of subterranean percolating water, and overrules its decision that an action would lie for the diversion of underground and percolating water which would otherwise have gone into a stream which flowed to the plaintiff's mill and was applied to the working of it.

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whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in unknown channels.

Easements acquirable in underground water flowing in known and defined channels.

This settlement of the law makes it clear that while easements are incapable of acquisition in the latter case, they can be acquired in either of the two former cases, for one of the propositions which *Chasemore* v. *Richards* has sanctioned is that where underground water is found to be flowing in a certain, defined, and well-known channel, the usual considerations affecting the flow of underground water and negativing the existence of natural rights or the acquisition of easements do not apply.

This was the opinion of Lord Chelmsford, L.C., in *Chasemore* v. *Richards*.[1] He says: "The law as to water flowing "in a certain and defined channel has been conclusively "settled by a series of decisions in which the whole subject "has been very fully and satisfactorily considered, and the "relative rights and duties of riparian proprietors have been "carefully adjusted and established."

"The principle of these decisions seems to me to be appli- "cable to all water flowing in a certain and defined course, "whether in an open visible stream or in a known subterranean "channel; and I agree with the observation of Lord Chief "Baron Pollock, in *Dickinson* v. *The Grand Junction Canal* "*Co.*,[2] that if the course of a subterranean stream were well "known, as is the case with many which sink underground, "pursue for a short space a subterraneous course, and then "emerge again, it never could be contended that the owner of "the soil under which the stream flowed could not maintain "an action for the diversion of it, if it took place under such "circumstances as would have enabled him to recover had the "stream been wholly above ground."

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[1] (1859) 7 H. L. C. at p. 374; *see* also, *Grand Junction Canal Co.* v. *Shugar* (1871), L. R., 6 Ch, App., 483 (187).

[2] *Ubi sup.*

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D.—Easements relating to the discharge of rain-water upon adjoining land.

Easement of eaves-dropping.

Under this classification fall the rights, which can be acquired by user or other methods applicable to easements, of discharging rain-water on to another's land from a wall or roof of a house.[1]

This is known in England as the easement of eaves-dropping.

In connection with, or independently of, such easements, a prescriptive right can be acquired to the projection of the wall or eaves over adjoining land.[2]

Jus projiciendi.

This is the *jus projiciendi*.

The right to discharge rain-water upon adjoining land may be either—

(1) The right to the dripping of rain-water from such projection[3] (*stillicidium*); or — *Stillicidium.*

(2) The right to discharge rain-water in a flow[4] (*flumen*). — *Flumen.*

Extent of the easements.

The right does not extend to obliging the servient owner to keep his land open for the reception of the water by not building on it, for the servient owner can build on his land as he pleases, provided he makes the necessary arrangements to receive the water discharged and carry it away.[5]

No reciprocal easement in servient owner.

On the principle that the servient owner cannot acquire a reciprocal easement against the dominant owner, the flow of water for twenty years from a house could not give a right to the servient owner to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof.[6]

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[1] *Thomas* v. *Thomas* (1835), 2 Cr. M. & Ros., 34; *Mohanlal* v. *Amratlal* (1873), I. L. R., 3 Bom., 174; *Bala* v. *Maharu* (1895), I. L. R., 20 Bom., 788; *Hayagreeva* v. *Sami* (1891), I. L. R., 15 Mad., 286.

[2] *Ibid.*; and *see Ranchod Shamji* v. *Abdulabhai Mithabai* (1904), I. L. R., 28 Bom., 428.

[3] *Thomas* v. *Thomas* (1835), 3 Cr. M. & Ros., 34.

[4] *Foy* v. *Prentice* (1845), 1 C. B., 828; *Mohanlal* v. *Amratlal* (1878), I. L. R., 3 Bom., 174; *Hayagreeva* v. *Sami* (1891), I. L. R., 15 Mad., 286.

[5] *Bala* v. *Maharu* (1895), I. L. R., 20 Bom., 788.

[6] *See Wood* v. *Waud* (1849), 3 Exch. at p. 778; 18 L. J. Exch. at p. 313; and *see supra*, A, and Chap. II.

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E.—Easements relating to taking water from, or conducting water from, or over, the servient tenement.

(1) Under the former head falls the right of the dominant owner to go on the servient tenement, and take away water from a spring,[1] a well, or a tank for use in his house or on his land.[2]

(2) Under the latter head falls the right of the dominant owner to conduct water from, or over, the servient tenement through a pipe or other means of transit for use in his own house or on his own land.[3]

Confer a double right.

These easements in fact confer a double right. There is first the right to go on the servient tenement, and secondly, the right to take or conduct the water. In the case of a spring, the second right will only come into existence as an easement if the spring from which the water is taken is the product of the servient tenement, or the water taken therefrom is confined within some cistern or vessel for the use of the servient owner making it his property.[4] A spring flowing from a distance and supplied or renewed by nature is not the subject of property. It is *res nullius* open to all who have the right to go on the land.[5]

The right to take water from a pond or tank is not a *profit à prendre* but an easement, as a *profit à prendre* must be something taken from the soil.[6]

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[1] Indian Easements Act, s. 4, ill. (*b*), App. VII. If the spring were not the product of the servient tenement, the easement would be confined to going on the servient tenement, and the spring would be *res nullius*, *Race* v. *Ward* (1855), 4 E. & B., 702; 24 L. J. Q. B., 153; *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom., 51, 52.

[2] *Manning v. Wasdale* (1836), 5 A. & E., 758; 6 L. J. N. S. K. B., 59; *Race* v. *Ward*, *ubi sup.*

[3] Indian Easements Act, s. 4, ill. (*c*), App. VII. For instances of the exercise of the easement for domestic or other like purposes, *see Sutcliffe* v. *Booth* (1863), 9 Jur. N. S., 1037; *Holker* v. *Porritt* (1875), L. R., 10 Exch., 59; *Roberts* v. *Richards* (1881), 50 L. J. Ch., 297; and for instances of the exercise of the easement for purposes of irrigation, *see supra*, B, under "Artificial channels in connection with irrigation."

[4] *Race* v. *Ward*, *ubi sup.*

[5] *Ibid.*

[6] *Manning* v. *Wasdale* *ubi sup.*, and *see Race* v. *Ward*, *ubi sup.*

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F.—Easements affecting the natural condition of water by pollution or alteration of temperature.

(1) *Easements relating to pollution of water.*

Every landowner has a natural right to the purity of water passing by, or over, or percolating through, his land.[1]

This right can be restricted by the acquisition of an easement either by user or grant entitling adjoining landowners to pollute such water.

In what cases the easements can be acquired.

The easements can be acquired not only in the case of streams flowing in defined channels,[2] but in the case of water percolating through the soil.[3]

Distinction between *flow* and *purity of* percolating water. *Ballard* v. *Tomlinson*.

The case of *Ballard* v. *Tomlinson*[4] makes it clear that, as regards the existence of natural rights, and consequently the acquisition of easements, the *flow* of percolating water is governed by different principles from the *purity* of percolating water.

In the one case, percolating water below the surface of the earth is a common reservoir or source in which nobody has any property but of which every one, as far as he can, has the right of appropriating the whole.[5]

In the other case, the right to appropriate gives no right to pollute, and a landowner can object to pollution on the part of his neighbour where he cannot object to appropriation.[6]

For the purposes of the acquisition of the right by user the pollution cannot be said to commence until the stream is first prejudicially affected,[7] and the extent of the acquired right is to be measured by the user which originated the right.[8]

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[f] Indian Easements Act, s. 7, ill. (*f*), App. VII, and *see* Chap. V, Part III, A (3) & D.

[2] *Bealey* v. *Shaw* (1805), 6 East. at p. 214; *Wright* v. *Williams* (1836), 1 M. & W., 77; 5 L. J. N. S., Exch., 107; *Wood* v. *Waud* (1849), 3 Exch., 718; 18 L. J. Exch., 305.

[3] *Ibid.*

[4] (1885) 29 Ch. D., 115.

[5] *Ibid.*

[6] *See* the judgment of Brett, M.R., *Ibid.* at p. 119.

[7] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1865), L. R., 1 Ch. App., 349. *See* I. E. Act, s. 15, Expl. IV, App. VII.

[8] *See Crossley* v. *Lightowler* (1867), L. R., 2 Ch. App., 478, and Chap. VIII, Part I, B.

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Extent of pollution should be defined and regular.

It appears that the pollution must be defined and regular in extent and referable to a particular source, such as in the case of a private sewer pouring its drainage, or in the case of a manufactory discharging its refuse, into the stream, otherwise it is doubtful whether any prescriptive right will be acquired.[1]

Thus it seems that a process of pollution which is indefinable in its extent and source, such as that which is caused by the gradually increasing discharge of the sewage of a town into the particular stream, can create no prescriptive right in that respect in favour of the urban sanitary authorities, at any rate until the full measure of pollution has been accomplished and enjoyed for the necessary period.[2]

And in the same circumstances a prescriptive right might arise in favour of the inhabitants of the town individually, where each had drained in a particular manner into the stream for the necessary period.[3]

(2) *Easements affecting the temperature of water.*

Every riparian owner and every owner of land abutting on a natural lake or pond into or out of which a natural stream flows has a natural right that the water transmitted to him shall not be affected in temperature.[4]

Any act affecting the natural state of the water is an infringement of the natural right [5] and can be supported only by proof of an easement.

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[1] *See Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1865), L. R., 1 Eq., 161; on appeal, L. R., 1 Ch. App., 349; *Crossley* v. *Lightowler* (1867), L. R., 2 Ch. App., 478.

[2] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners, ubi sup.*

[3] *Att.-Genl.* v. *Acton Local Board* (1882), 22 Ch. D. at p. 229.

[4] *See* Indian Easements Act, s. 7, *cl.* (*i*), App. VII; *Sutcliffe* v. *Booth* (1863), 9 Jur. N. S. 1037; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas., 691 (700).

[5] *See Mason* v. *Hill* (1833), 5 B. & Ad., 1; 2 Nev. & Man., 747; *Wood* v. *Waud* (1849), 3 Exch., 748; 18 L. J. Exch., 305; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas., 691, and Chap. V, Part III, A (2).

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Part IV.—Easements relating to support.

A.—Generally.

It will be convenient to consider these easements under the following heads:— Two classes of Easements relating to support.

I. Easements conferring rights to have support, or shortly, easements of support.

II. Easements conferring rights to take away support.

Easements relating to support are restrictions, in the one case, of the natural right which allows a man to enjoy and dispose of his property according to the ordinary rights of ownership, and, in the other, as the case may be, either of the natural right of support, or of the easement of support.

They are either connected with the support of buildings by land and the support of buildings by buildings, or are acquired in reference to mining operations, in which case they are usually described as easements to let down the surface.

It will be seen, hereafter, that there is a natural right of support for land by land, imposing an obligation on adjoining landowners that they shall not in the free enjoyment of their property infringe the maxim, "*Sic utere tuo ut alienum non lædas.*"[1] With that reservation every landowner is entitled to the free use and enjoyment of his property. He may do on it what he pleases, he may build on it, he may dig mines in it, he may excavate it for any purpose, so long as he does not interfere with the support which his neighbour's land or building may require of his land or building either as a natural right or as an easement.

The true nature of the right conferred by an easement of support is not that the adjacent and subjacent soil shall not be disturbed, but that the disturbance shall not cause injury to the dominant tenement, for until actual damage is done, True nature of right conferred by easement of support.

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[1] *See* Chap. V, Part IV.

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no cause of action arises.[1] The same principle applies to the natural right of support for land, which is of the same character as the easement of support.[2]

Question whether easements of support, affirmative or negative.

The question whether easements of support are affirmative or negative easements is one of considerable doubt and difficulty. It was first raised in the important case of *Angus* v. *Dalton*,[3] and occasioned considerable diversity of opinion.

In one sense, easements of support may be called *negative* easements as being rights that the servient owner shall not do anything on the servient tenement which deprives the dominant tenement of its support. In another sense, may not they be called *affirmative* easements as involving pressure on, and actual use of, the supporting soil?

Dalton v. *Angus*.

The latter view was taken by four of the judges[4] in the case under reference when, as *Dalton* v. *Angus*,[5] it was heard by the House of Lords on appeal, and the opinion of seven judges of the High Court was taken on the questions raised in the case.

The judges of the Queen's Bench Division,[6] and of the Appeal Court,[7] do not appear to have contemplated the possibility of an easement of support being regarded otherwise than as a negative easement, for, as will presently be seen, they discussed the mode of acquisition of the easement from the view of its analogy to the easement of light, which is undoubtedly a negative easement.

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[1] *Bonomi* v. *Backhouse* (1859), E. B. & E., 646 (654), affirmed on error *sub nom.* *Backhouse* v. *Bonomi* (1861), 9 H. L. C., 503; *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 808; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas., 127; *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson, Ltd.* (1908), App. Cas., 27. *See* further, Chap. V, Part IV. Thus, in estimating the damages recoverable by a surface owner for subsidence caused by the working of minerals under or adjoining his property, the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account, for such depreciation gives no cause of action, *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson*, *ubi sup.*

[2] *Bonomi* v. *Backhouse*, *ubi sup.* at p. 655, and *see* Chap. V, Part IV.

[3] (1878–1881) 3 Q. B. D., 85; 4 Q. B. D., 162; S. C. *Dalton* v. *Angus*, 6 App. Cas. 740.

[4] Lindley, J., Bowen, J., Lord Selborne, L.C., and Lord Watson.

[5] *Ubi sup.*

[6] 3 Q. B. D., 85.

[7] 4 Q. B. D., 162.

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Fry, J., on the reference by the House of Lords, said[1]: "The right to support and the right to the access of light and "air are very similar the one to the other, and are broadly "distinguished from most other easements. They are "analogous with *servitutes ne facias* in the Civil Law. Such "rights when they arise spring, not from acts originally "actionable or unlawful on the part of the dominant owner, "but from acts done on his own land and within his own "rights; they confer on the dominant owner not the right "to use the subject, but a right to forbearance on the part "of the owner from using the subject, *i.e.* they create an "obligation on the owner of the servient tenement not to do "anything on his own land inconsistent with a particular "user of the dominant tenement. They rest on a presump-"tion or inference, not of a grant by the neighbour of "a right to do something on the grantor's land, but of a "covenant by the owner not to do something on his own "land."

In the House of Lords, however, two of the seven judges (Lindley and Bowen, JJ.)[2] and the Lord Chancellor (Lord Selborne),[3] though not repudiating the negative character of the easement, gave it as their opinion that it was both scientifically and practically inaccurate to limit it to that definition; whilst another of the Law Lords (Lord Watson)[4] went so far as to say that he was unable to regard the rights of support to a building as a negative easement at all,[5] but admitted that he was influenced in that opinion by the consideration that a decision to the effect that the easement was negative would form an unsatisfactory precedent in Scotland, where only affirmative easements could be acquired by prescription.

A difficulty in the way of regarding the easement as wholly affirmative is suggested in the judgments of Lindley, J., and

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[1] 6 App. Cas. at p. 776.
[2] 6 App. Cas., pp. 763, 764, 784.
[3] *Ibid.*, p. 793.
[4] *Ibid.*, p. 831.
[5] Lord Watson thought it as much an affirmative easement as the well-known servitude *oneris ferendi*, when a wall or beam is rested on the servient tenement.

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Bowen, J.,[1] who admit that the pressure of a man's building upon his neighbour's soil has never been known to give rise to a right of action on the neighbour's part (Bowen, J., recognising that practical reasons of convenience are adducible against it), though they incline to the opinion that an action ought on principle to lie against a person who uses his neighbour's land to support his house without his neighbour's consent.

The same difficulty appears to have been felt by Fry, J. He was unable to adopt the view that the act of building a house on land which derives support from the adjoining soil of a different owner was actionable. He was of opinion that the lateral pressure of a heavy building on a neighbour's soil causing ascertainable physical disturbance would no doubt be trespass, but that an action for the mere increment caused by a new building to the pre-existing lateral pressure of the soil and producing no ascertainable physical disturbance was unheard of.

In his view, if that were the law, not only could no one build on the edge of his land except on a rock, but the erection of a house would give a right of action not only to adjoining landowners, but to every landowner within the unascertainable area of whose land the increase of pressure must extend.

The law, he said, takes no heed of such lateral pressure when unattended by ascertainable physical consequences, and, in his opinion, the distinction between the principles applicable to water flowing in visible channels above ground and water flowing in invisible channels underground afforded a good analogy to the distinction drawn by him between lateral pressure which is followed by ascertainable physical disturbance and lateral pressure which produces no such result.[2]

In this respect an easement of support can hardly be said to be on the same footing as an affirmative easement such as a right of way, with reference to which it would

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[1] *Ibid.*, pp. 764, 784.

[2] 6 App. Cas., p. 775.

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always be in the power of the servient owner before the right had matured to prevent the acquisition of the right by actual interruption or by civil action in the courts for trespass.

The result is that easements of support must be considered as of mixed character, undoubtedly negative, but capable also of being affirmative.

Modes of acquisition of easements relating to support.

The acquisition of easements relating to support is founded on grant, express or implied, or covenant, or on user of the dominant tenement for the period and in the manner required by law.[1]

In India the acquisition of these easements is also governed by the Indian Limitation Act[2] and the Indian Easements Act.[3]

Classification of easements of support.

Easements of support may conveniently be divided into two classes according to the nature of the support afforded, namely—

(1) Rights to support in excess of Natural Rights.

(2) Rights to support where Natural Rights do not exist.

Within the first class properly fall—

(*a*) Rights to support for excavated land by adjacent land.

(*b*) Rights to support for buildings by adjacent and subjacent land.

Within the second class properly fall—

(*a*) Rights to support for buildings by buildings.

(*b*) Right to support for surface land by subjacent water.

B.—In Particular.

I.—Easements of support.

(1) Rights to support in excess of natural rights.

(*a*) *Right to support for excavated land by adjacent land.*

The right of support for land in its natural condition by adjacent land is a natural right and incidental to the ownership

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[1] *See infra*, Chaps. VI and VII, according to the classification of the subject.

[2] *See* Chap. VII, Part II.

[3] *See* Chap. VII, Part III.

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of property.[1] Any change in the land supported which converts its natural character into an artificial character, such as would be caused by placing buildings upon it or excavating it, would obviously impose a changed or increased burthen upon the adjoining land, the effect of which would not alter or increase the previous obligation unless the existence of an easement could be proved.

The natural right does not in such cases disappear. The right of support to the extent of the natural right remains, to which is superadded the right of support conferred by the easement.[2]

Partridge v. *Scott.*

The case of *Partridge* v. *Scott*,[3] though not a direct authority upon the subject of the support of excavated land by adjacent land, serves to shew that the act of excavation would change the former character of the land so as to make the acquisition of an easement essential to a right of support from the adjacent land.

In that case it was held that the plaintiff, who had built a house on his own land previously excavated to its extremity for mining purposes, did not acquire a right to support for the house from the adjacent land at least until twenty years had elapsed since the house first stood on the excavated land, from which a grant by the owner of the adjoining land might be inferred.

Though this was a case of support to a house, it seems clear that the decision would have been the same if the house had not been built, and the right of support had been claimed for the excavated land alone.

(b) Rights to support for buildings by adjacent and subjacent land.

Of the two kinds of easements of support these rights are the more usual and the more important.

They may be called easements of natural support as

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[1] *See* Chap. V, Part IV.

[2] *Ibid.*

[3] (1838) 3 M. & W., 220.

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distinguished from easements of support for buildings by buildings, which may be described as easements of artificial support.

They have been said to hold an intermediate place between the artificial right and the natural right of property, by which a man is entitled to have his soil supported laterally by his neighbour's soil.[1]

They have an affinity to the natural right if the means of support be considered; they are more akin to the artificial right, if the object of support be considered.[2]

They have been the subject of frequent litigation in the courts from the earliest times and have given rise to a considerable diversity of judicial opinion.

It may now be taken as settled law that the right of support for a building from subjacent or adjacent land or, in other words, the right of vertical or lateral support, is not a natural right incidental to the ownership of land, but an easement.[3]

Wilde v. *Minsterley*.

In *Wilde* v. *Minsterley*[4] it is said: "If *A* seized in fee of "land next adjoining land of *B*, erect a new house on the land, "and part of the house is erected on the confines of his land "next adjoining the land of *B*, if *B* afterwards digs his land near "to the foundation of the house of *A*, but not touching the land "of *A*, whereby the foundation of the house and the house "itself fall into the pit, still no action lies at the suit of *A* "against *B*, because this was the fault of *A* himself that he "built his house so near to the land of *B*, for he could not "by his act hinder *B* from making the most profitable use of

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[1] *See per* Thesiger, L.J., in *Angus* v. *Dalton* (1878), 4 Q. B. D. at pp. 167, 169.

[2] *Ibid.* at p. 169.

[3] *Wilde* v. *Minsterley* (1640), 2 Rolle's Ab., 564, tit. Trespass (L), pl. 1.; *Wyatt* v. *Harrison* (1832), 3 B. & Ad., 871; *Partridge* v. *Scott* (1836), 3 M. & W., 220; *Humphries* v. *Brogden* (1850), 12 Q. B., 739; 20 L. J. Q. B., 10; *Gayford* v. *Nicholls* (1854), 9 Exch., 702; 23 L. J. Exch., 205; *Bonomi* v. *Backhouse* (1859), E. B. & E., 646 (654), (655), affirmed on error *sub nom. Backhouse* v. *Bonomi* (1861), 9 H. L. C., 503; *Angus* v. *Dalton* (1878-1881), 3 Q. B. D., 85; 4 Q. B. D., 162; *Dalton* v. *Angus*, 6 App. Cas., 740.

[4] (1640) 2 Rolle's Ab., 564, tit. Trespass (I), pl. 1.

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"*B's* own land. But *semble* that a man who has land next "adjoining to my land cannot dig his land so near to my land "that thereby my land shall fall into his pit; and for this if "an action were brought it would lie."

Partridge v. *Scott.*

In *Partridge* v. *Scott*,[1] Alderson, B., said[2]: "If a man builds "his house at the extremity of his land, he does not thereby "acquire any right of easement, for support or otherwise, over "the land of his neighbour. He has no right to load his own "soil so as to make it require the support of that of his neigh- "bour, unless he has some grant to that effect. *Wyatt* v. "*Harrison*[3] is precisely in point as to this part of the case, "and we entirely agree with the opinion there pronounced."

Humphries v. *Brogden.*

In *Humphries* v. *Brogden*,[4] which was a case of natural support of land, Lord Campbell, C.J., said: "This case is "entirely relieved from the consideration how far the rights "and liabilities of the owners of adjoining tenements are "affected by the erection of *buildings*; for the plaintiff claims "no greater degree of support for his lands than they must "have required and enjoyed since the globe existed in its "present form."

Gayford v. *Nicholls.*

In *Gayford* v. *Nicholls*,[5] which was the case of a new building, Parke, B., said: "This is not a case in which the "plaintiff has the right of the support of the defendant's "soil either by virtue of a twenty years' occupation, or by "reason of a presumed grant, or by a presumed reservation "where both houses were originally in possession of the same "owner; for, unless a right of support can by some such "means be established, the owner of the soil has no right of "action against his neighbour who causes the damage by the "proper exercise of his own right."

Bonomi v. *Backhouse.*

In *Bonomi* v. *Backhouse*,[6] Willes, J., points out that the right to support of land is a natural right, being *primâ facie*

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[1] (1838) 3 M. & W., 220.

[2] *Ibid.* at p. 228.

[3] (1832) 3 B. & Ad., 875.

[4] (1850) 12 Q. B., 739; 10 L. J. Q. B., 10.

[5] (1854) 9 Exch., 702; 23 L. J. Exch., 205.

[6] (1859) E. B. & E. at pp. 654, 655, affirmed on error *sub nom. Backhouse* v. *Bonomi* (1861), 9 H. L. C. 503. As to the natural right of support, *see* Chap. V, Part IV.

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a right of property, but that the right to support of buildings is an easement founded on prescription or grant, express or implied.

Lastly, in *Angus* v. *Dalton*[1] (*Dalton* v. *Angus*, on appeal to the House of Lords) all the judges took the view that the right to support for a house from land was an easement, though they differed materially as to the mode of the acquisition of the right by lapse of time. *Angus* v. *Dalton.*

It being then undoubted that the right of support for a building from land is an easement, it remains to be considered by what means such an easement can be acquired otherwise than by grant, express or implied.[2]

As to this, all the authorities are agreed that after user for twenty years the right is acquired, though they differ materially as to the quality of the user required for such purpose. Acquisition by user.

In this connection it is important to examine the course of judicial opinion culminating in the leading case of *Angus & Co.* v. *Dalton and the Commissioners of Her Majesty's Works and Public Buildings*,[3] in which the subject was fully considered and discussed by many eminent judges. The quality of the user.

The first case of importance is *Palmer* v. *Fleshees*,[4] which was an action for the obstruction of the plaintiff's lights; but the judges in their first resolution say, "that if a man, being "seized of land leases forty feet to *A* to build a house thereon, "and forty feet to *B* for a like purpose, and one of them builds "a house and then the other digs a cellar in his land which "causes the wall of the first adjoining house to fall, no "action will lie, for every one may deal with his own to his "best advantage, but *semble*, that it would be otherwise if the "wall or house were an ancient one." *Palmer* v. *Fleshees.*

In *Stansell* v. *Jollard*,[5] Lord Ellenborough directed the jury that "where a man has built at the extremity of his *Stansell* v. *Jollard.*

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[1] (1878-1881) 3 Q. B. D., 85; 4 Q. B. D., 162; 6 App. Cas., 740.

[2] *See* Chap. VI, Parts I, II, and IV.

[3] (1878-1881) 3 Q. B. D., 85; 4 Q. B. D., 162; *Dalton* v. *Angus*, 6 App. Cas., 740.

[4] (15, Charles II) 1 Sid., 167. Cited in Comyn's Digest, action on the case, Nuisance C.

[5] (1803) 1 Selw. N. P., 457 (11th Ed.); referred to in notes to *Ashby* v. *White*, 1 Sm., L. C., 11th Ed., p. 279.

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"land, and has enjoyed his building above twenty years, by "analogy to the rule as to lights, he has acquired a right "to support, or, as it were, of leaning to his neighbour's "soil, so that his neighbour cannot dig so near as to re- "move that support; but it is otherwise of a house newly "built."

Wyatt v. *Harrison.*

In *Wyatt* v. *Harrison*,[1] the plaintiff's claim for a right of support to his house failed because it was not an ancient house, but Lord Tenterden in giving judgment suggested that if the damage complained of were in respect of an ancient building possessed by the plaintiff at the extremity of his own land, such circumstance of antiquity might imply the consent of the adjoining proprietor, at a former time, to the erection of a building in that situation.

Partridge v. *Scott.*

The case of *Partridge* v. *Scott*[2] is important in many respects. There the building, though ancient, had been erected on ground excavated within twenty years of the suit; and, if there had been no excavation, the mining operations of the defendants on the adjacent land would not have injured the house. In these circumstances the Court decided that the plaintiff had acquired no right to support for his house from the adjacent soil; but the judgment practically affirms the proposition that, but for the excavation of the soil on which the house stood, an easement of support would have been acquired after twenty years by implied grant, and that a grant might have been inferred from twenty years' enjoyment of the house, although standing on the excavated ground, after the defendants were, or might have been, fully aware of the facts.

The judgment appears to assume that in the case of a house standing upon land in its natural condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years.

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[1] (1832) 3 B. & Ad., 875.

[2] (1838) 3 M. & W., 220.

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In *Hide* v. *Thornborough*,[1] Baron Parke held that support of the plaintiff's house for twenty years to the knowledge of the defendant created an easement in favour of the plaintiff to whom the defendant was liable in damages for injury resulting to the plaintiff's house from withdrawal of the support. *Hide* v. *Thornborough*.

In *Humphries* v. *Brogden*,[2] which was a case of the natural right of support for land by land, the Court in discussing the principles relating to lateral support treated it as settled law that a right of lateral support of a house by adjacent land was acquired like other easements by twenty years' uninterrupted enjoyment of the house. *Humphries* v. *Brogden*.

In *Gayford* v. *Nicholls*,[3] the building was not an ancient one, and Parke, B., said: "This is not a case in which the "plaintiff has a right of the support of the defendant's soil, "either by virtue of a twenty years' occupation, or by reason "of a presumed grant, or by a presumed reservation where "both houses were originally in the possession of the same "owner; for unless a right of support can by some such "means be established, the owner of the soil has no right of "action against his neighbour, who causes the damage by the "proper exercise of his own right." *Gayford* v. *Nicholls*.

In *Rowbotham* v. *Wilson*,[4] where the questions before the Court involved the right to the support of houses by adjacent soil, some of the judges considered it as undoubted that after a house had stood for twenty years an easement of support was acquired.[5] *Rowbotham* v. *Wilson*.

In *Rogers* v. *Taylor*,[6] which was a case of vertical support, it was proved that the defendant in working quarries on adjacent land had so weakened the foundations of the plaintiff's house that it fell, and Cockburn, C.J., told the jury that he thought at the end of twenty years after the house had been built, the plaintiff would have acquired a right of support, unless *Rogers* v. *Taylor*.

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[1] (1846) 2 C. & K., 254.

[2] (1850) 12 Q. B., 749; 20 L. J. Q. B., 10.

[3] (1854) 9 Exch., 702 (708); 23 L. J. Exch., 205.

[4] (1856–1860) 6 E. & B., 593; in error 8 E. & B., 123; in error 8 H. L. C., 348.

[5] 8 E. & B., *per* Watson, B., at p. 142, and *per* Bramwell, B., at p. 147.

[6] (1858) 2 H. & N., 828.

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in the mean time some thing had been done to deprive him of it, and that the jury must presume that the additional burthen was put upon the plaintiff's land by the assent of the adjoining owner, and that there had been a grant by such owner of a right of support. He left it to the jury to say whether the plaintiff had enjoyed the support for the foundation of his house for twenty years, and the verdict found for the plaintiff upon the direction was upheld by the Court.

Bonomi v. *Backhouse.*

In *Bonomi* v. *Backhouse*,[1] the judgment of the Exchequer Chamber was delivered by Willes, J., who said[2]: "The right "to support of land and the right to support of buildings "stand upon different footings as to the mode of acquiring "them, the former being *primâ facie* a right of property analo- "gous to the flow of a natural river, or of air[3]; *Rowbotham* v. "*Wilson*[4]; although there may be cases in which it would be "sustained as a matter of grant (*see The Caledonian Railway* "*Co.* v. *Sprot*)[5]; whilst the latter must be founded upon "prescription or grant, express or implied; but the character "of the rights, when acquired, is in each case the same."

Angus v. *Dalton.*

This brings the examination of the authorities down to the leading case of *Angus & Co.* v. *Dalton and the Commissioners of Her Majesty's Works and Public Buildings.*[6]

This celebrated case occupied the attention of the Courts between the years 1878 and 1881. It was first before the Queen's Bench Division, then before the Court of Appeal, and finally before the House of Lords. The case was twice argued before the latter tribunal, and on the second occasion in the presence of the following judges: Pollock, B., Field, Lindley, Manisty, Lopes, Fry, and Bowen, JJ.

In this case the plaintiffs sued the defendants for excavating

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[1] (1859) E. B. & E., 646, affirmed on error *sub nom. Backhouse* v. *Bonomi* (1861), 9 H. L. C., 503.

[2] *Ibid.* at p. 654.

[3] As to natural right of support, *see* Chap. V, Part IV.

[4] *Ubi sup.*

[5] 2 Macq. Sc. App., 449. This refers to a case where there has been a severance of land originally in the possession of the same owner and a conveyance of the surface for the express purpose of building. *See infra.*

[6] (1878-1881) 3 Q. B. D., 85; 4 Q. B. D., 162; *Dalton* v. *Angus*, 6 App. Cas., 740.

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the soil of an adjoining house in such a manner as to leave the foundation of part of the plaintiffs' building without sufficient lateral support and thereby causing it to fall.

The plaintiffs were the owners of a building at Newcastle converted by them from a dwelling-house into a coach factory twenty-seven years before the act complained of in the suit. The building had stood for about a hundred years and had apparently been built at the same time as a building standing on adjoining land to which it was contiguous.

There was no party wall between the buildings; each rested on its own walls, was built to the extremity of the soil of the respective owner, and depended for its lateral support on the soil upon which the other rested. In the course of the conversion of the plaintiffs' dwelling-house into a coach factory whereby the character and construction of the building had been altered, the internal walls, which had previously existed, were removed, and girders supporting the upper floor of the factory were on one side let into a large chimney stack, which extended along a portion of the dividing wall, and on the opposite side took their bearings from the plaintiffs' wall. The effect of this change of construction was to throw about one-fourth of the weight of the factory upon the chimney stack, the foundations of which being in contact with the soil under the adjoining house, the lateral pressure upon that soil was materially increased. No express assent to the alteration was given by the owner of the adjoining house, but he must have been aware of the conversion of the dwelling-house into a factory, although there was nothing to shew his having been aware of the precise nature of the internal alterations or of the exact effect they would have as regards the lateral pressure.

The adjoining house continued in its character of a dwelling-house until shortly before the commencement of the action, when the defendants, the Commissioners, acquired it and engaged the defendant, Dalton, to pull it down, excavate to such a depth as would enable the cellarage, which had not previously existed, to be made, and to erect upon the site of the old house a building to be used as a Probate Office.

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Dalton in his turn employed sub-contractors to do the work.

In the course of excavation, which had been carried to a depth of several feet below the level of the foundation of the plaintiffs' chimney stack, and notwithstanding that a thick pillar of the original clay had been left round the stack for its support during the erection of the new dividing wall, the clay gave way after exposure to the air, and the stack sank and fell, carrying with it a considerable portion of the factory, and causing damage to the plaintiffs in respect of which the action was brought.

The defendants, the Commissioners, denied the right of support and contended that they were not responsible for the acts of their contractor.

The defendant, Dalton, took the same defence as regards the sub-contractors. These points were reserved at the trial which took place before Lush, J., and a verdict was entered for the plaintiffs subject to the questions of law and to a reference to an arbitrator to assess the damages, in case the verdict should stand against both or either of the defendants.

Opinion of the Queen's Bench Division.

The plaintiffs moved for judgment before the Queen's Bench Division. The Court, by a majority, came to the conclusion that a verdict should be entered for the defendants. All the judges were agreed that on the authority of *Bower* v. *Peate*,[1] the defence that the defendants were not liable for the acts of the contractors failed, that the right of support claimed was an easement, and that such an easement was not one which was within the Prescription Act, but they differed on the question as to whether the plaintiffs had made out a good title to the easement.

Lush, J.

Lush, J., adhered to the opinion that a verdict should be entered for the plaintiffs, as he thought they had established their claim to a right of support which had been infringed by the act of the defendants.

He based his view of the law partly on the ground of

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[1] (1876) 1 Q. B. D., 321, and *see infra* under "Negligence."

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prescription and partly on the necessary effect of the Limitation Act upon the easement in suit, a view which he thought might enable what he stigmatised as the revolting fiction of a lost grant to be discarded. He thought it would be a strange anomaly to hold that a title to a house should be acquired after twenty years, and not a title to that which was essential to its existence. He said, however, that it was not necessary to base his judgment on that ground, and he was content to rest it on the doctrine of an unrebutted presumption, and he concluded that the mere absence of assent, or even the express dissent of the adjoining owner, would not prevent the acquisition of the right by uninterrupted enjoyment, and that nothing short of an agreement, either express or to be implied from payment or other acknowledgment, that the adjoining owner should not be prejudiced by abstaining from the exercise of his right, would be sufficient to rebut the presumption.

Cockburn, C.J., on the other hand, Mellor, J., agreeing with him, was of opinion that by mere enjoyment of the lateral support of their factory by the adjacent soil for the time stated, without more, the plaintiffs had not acquired an easement which prevented the defendants from dealing as they pleased with their own land for legitimate purposes. He took the view that any presumption arising from length of enjoyment with respect to the easement in suit was one which, both at Common Law and since the Prescription Act, was open to rebuttal, and as no grant had been established in the case, and none could be implied from the circumstances, the presumption not only failed but had never in fact arisen. Cockburn, C.J., Mellor, J.

The important factor in the case on which his decision turned was the conversion of the plaintiffs' building into a factory.

The absence of any assent by the adjacent owners, express or implied, to the new enjoyment of lateral support caused by such conversion, and of any reasonable means on his part of resisting or preventing such enjoyment, was, in his opinion, a bar to the acquisition of the right.

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Opinion of the Appeal Court.

On appeal, Brett, L.J., dissenting, this decision was reversed except as regards those points upon which the judges of the Queen's Bench Division were agreed. It is, therefore, only necessary to notice the judgment of the Court of Appeal on the question of the mode and circumstances in which the right claimed may be acquired.

Thesiger, L.J.

Thesiger, L.J., in a carefully considered and exhaustive judgment, in which all the authorities were examined, came to the following conclusions :—

(*a*) That the right claimed must be founded on prescription or grant, express or implied. In this respect the Lord Justice found himself unable to agree with the view taken by Lush, J., that an absolute right to an easement uninterruptedly enjoyed for twenty years might be obtained by analogy to the Statute of Limitation.

(*b*) That the presumption of a lost grant is not a *presumptio juris et de jure*, that is, not an absolute and conclusive bar, and that the correct view on this point is that the presumption of acquiescence and the fiction of an agreement deduced therefrom in a case, where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an *estoppel by conduct*, which while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct.

(*c*) That the cases of *Barker* v. *Richardson*,[1] *Chasemore* v. *Richards*,[2] and *Webb* v. *Bird*,[3] as direct authorities, go no further than to shew that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being instructed as regards the easement itself, or an uncertainty and secrecy of

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[1] (1821) 4 B. & A., 579.
[2] (1859) 7 H. L. C., 349.
[3] (1863) 13 C. B. N. S., 841.

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enjoyment putting it out of the category of all ordinary known easements will prevent the presumption of an easement by lost grant; and, on the other hand, indirectly, they tend to support the view, that as a general rule where no such legal incompetence, physical incapacity, or peculiarity of enjoyment, as was shewn in those cases, exists, uninterrupted and unexplained user will raise the presumption of a grant, upon the principle expressed by the maxim, "*Qui non prohibet "quod prohibere potest assentire videtur.*"

(*d*) That the same principles and presumptions of law are applicable to the acquisition of easements of support of buildings from adjoining soil as to that of easements generally, and that there is a close analogy in this respect between the easement in question and the easement of light.

(*e*) That the answer to the question whether the right of support acquired by user is an absolute one or subject to limitations is to be found in reference to the rule that user which is secret raises no presumption of acquiescence on the part of the servient owner.

It was upon the application of this rule to the fact of the undoubtedly unusual construction of the plaintiffs' factory, to the possibility of such construction being unreasonable, and to the doubt raised in the case as to whether the stack of brickwork would have fallen in consequence of the excavation without the extra weight of the upper floor of the factory upon it, that the Lord Justice considered the jury should have been directed to find whether the weight which had been put on the adjoining soil was such as the owner of the soil could, under the peculiar circumstances of the case, be reasonably expected to be aware of and provide for.[1]

Cotton, L.J., expressed the opinion that twenty years' enjoyment does not confer an absolute right but raises a

Cotton, L.J.

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[1] *See* further, *infra*, under "Easements of extraordinary support."

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presumption of a modern lost grant which is not capable of being rebutted by an admission of evidence that there was in fact no grant unless supported by additional evidence that the adjoining owner was incapable of making a grant, or by any other rebuttable evidence. There being no evidence that the owner of the adjoining house knew of the particular construction of the plaintiffs' house, he thought the question ought to have gone to the jury to find whether the support required for the plaintiffs' house was more than reasonably required by a house of the apparent dimensions and character of the house of the plaintiffs if used for the purpose for which the house was used.

He agreed with Thesiger, L.J., in thinking that if the defendants desired it, there must be a new trial.

Brett, L.J.

Brett, L.J., thought the judgment of the Queen's Bench Division should be affirmed on the ground that there was conclusive evidence or an admission that there never had been a grant, a circumstance which he considered fatal to the acquisition of the right. All the Lord Justices were at one that the right claimed was an easement, that it was not within the Prescription Act, and that it presented an analogy to the easement of light, and they all, Thesiger and Brett, L.JJ., expressly, and Cotton, L.J., impliedly, dissented from the doctrine deduced by Lush, J., from the Statutes of Limitation of the acquisition of the absolute right.

The result was that the Court of Appeal, Brett, L.J., dissenting, reversed the judgment of the Queen's Bench Division and ordered that the defendants should elect within fourteen days whether they would take a new trial, and, if they did not so elect, that judgment should be entered for the plaintiffs. The defendants having failed to elect, judgment was entered for the plaintiffs for £1,943, the amount of damages assessed by the special referee, and the defendants appealed to the House of Lords.

Opinions in the House of Lords.

The appeals were twice heard,[1] and the second time, in the

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[1] The first time, on Nov. 13th, 14th, and 17th, 1879, before Lord Cairns, L.C., Lord Penzance, and Lord Blackburn; the second time on Nov. 18th, 19th, 22nd, and

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presence of seven judges of the High Court (Pollock, B., Field, Lindley, Manisty, Lopes, Fry, and Bowen, JJ.) to whom five questions were put embodying the material points in the case.

The judges were unanimous in deciding that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment and could sue the owners of the adjoining land and the contractor for the damage caused by the excavation of the adjoining soil.

They concurred in affirming the proposition of law that a right of support for a building by adjoining land could be acquired by open uninterrupted enjoyment for twenty years, but they differed as to the nature and origin of the right acquired.

It will be useful to notice their opinions in detail.

The opinions of Pollock, B.,[1] Field[2] and Manisty,[3] JJ., proceeded not upon the ground of fiction or implied grant, but of a proprietary right rendered absolute and indefeasible after twenty years' uninterrupted enjoyment, and the first-mentioned judge expressed himself in favour of the view taken by Lush, J., as to the application by analogy of the Statutes of Limitation to the right in question. Pollock, B., Field and Manisty, JJ.

They agreed that in any view the enjoyment must not be *clam*, for no man could be bound by a right of the growing acquisition of which he had neither knowledge nor the means of knowledge.

They did not consider that actual assent or acquiescence on the part of the adjoining owner was a necessary ingredient in the process of acquisition, or that, with reference to the point raised in the third question put to the judges and treated by the Court of Appeal as a ground for a new trial, it was necessary to prove that the defendants or their predecessors in title had knowledge or notice of the alterations, in order to make the injury to the plaintiffs' building by

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23rd, 1880, before Lord Selborne, L.C., Lord Penzance, Lord Blackburn, Lord Watson, and Lord Coleridge.

[1] (1881) 6 App. Cas., 742 (747).
[2] *Ibid.* at p. 752.
[3] *Ibid.* at p. 767.

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removing the lateral support after a lapse of twenty-seven years an actionable wrong.

Finally they thought that the learned judge's direction to the jury was correct.

Lindley, J. Lindley, J.,[1] with whom Lopes, J.,[2] agreed, while deprecating a state of the law which required the adjoining owner to remove the soil used for support in order to preserve his unrestricted right, and, in this respect, differentiating the acquisition of an easement of support from that of an easement light, admitted that all the authorities treated the two rights as analogous and capable of being acquired in the same way.

In the face of the current of authority he was unable to come to the conclusion that the physical difficulty of obstruction brought the right to lateral support within the cases of *Webb* v. *Bird*,[3] *Chasemore* v. *Richards*,[4] and *Sturgess* v. *Bridgeman*[5]; for if those cases applied, the right to lateral support could not be acquired at all by mere enjoyment however long continued.

He felt himself bound by the authorities to hold that a right to lateral support could be acquired in modern times by an open uninterrupted enjoyment for twenty years unless the adjoining owner could shew that the enjoyment had been on terms which excluded the acquisition of the right.

The assent or acquiescence on the part of the servient owner to the erection of the supported building, with a knowledge of its particular mode of construction, would, notwithstanding the absence of any deed under seal, permit of an action for support being maintained—*Brown* v. *Windsor*.[6]

Assent or dissent on the part of the servient owner appeared to be immaterial unless he had disturbed the continued enjoyment necessary to the acquisition of the right. He thought the question whether the enjoyment in the case had been open was one of fact which, in view of the peculiar

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[1] *Ibid.*, p. 762.
[2] *Ibid.*, p. 767.
[3] (1863) 13 C. B. N. S., 841.
[4] (1859) 7 H. L. C., 349.
[5] (1879) 11 Ch. D., 852.
[6] (1830) 1 Cr. & J., 20.

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circumstances of the case, ought to have been left to the jury, and that in this respect the course taken by the learned judge at the trial in directing a verdict for the plaintiff was not correct.

Fry, J.,[1] thought that the right in suit rested on a covenant by a neighbour not to use his own land in any manner inconsistent with the support of the adjoining buildings, and that such a covenant might be either express or to be inferred from the object and purport of the instrument. He assumed acquiescence to be at the root of prescription, and the fiction of a lost grant, and that the acts or user which went to the proof of it must be *nec vi*, *nec clam*, *nec precario*, but he was unable to regard the right in question as anything but the result of an artificial rule of law with which knowledge and acquiescence had nothing to do. Fry, J.

He felt the same difficulty as Lindley, J., in approving a state of the law which permitted the acquisition of a right which could be prevented by no reasonable means.

He considered that, though it was of course physically possible for one man so to excavate his own soil as to let down his neighbour's building, and a man might or might not have occasion to excavate his own land for his own purposes, such an excavation for the sole purpose of letting down a neighbour's house was of so expensive, so difficult, so churlish a character, that it was not reasonably to be required in order to prevent the acquisition of the right, and that in fact in the case of adjoining houses, it would be to require a man to destroy his own property in order to protect his rights to it.

He thought the analogy to the Statute of Limitations suggested by Lush, J., was sound to the extent of holding that if the rights were to be acquired at all by lapse of time, twenty years was a reasonable period to confer the right, but that it went no further, for it was one thing to take away a right of action if not put in force within a reasonable time, and quite another thing to take away a man's right in his

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[1] (1881) 6 App. Cas., p. 771.

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property, because he does not bring an action which he cannot bring.

He was of opinion that the course taken by Lush, J., in directing a verdict for the plaintiffs was in accordance with the law as it then stood, but expressed his strong reluctance to accede to the proposition that by the mere act of his neighbour and by lapse of time, a man might be deprived of the lawful use of his own land.

Bowen, J.

From the opinion of Bowen, J.,[1] remarkable for its lucidity and closeness of reasoning, the following propositions may be collected :—

(*a*) An ancient house is entitled to such support from the adjacent soil as it has immemorially enjoyed.

(*b*) The right of support for a house from adjacent soil, as involving something beyond the natural use of a man's soil, namely, a collateral burthen upon his neighbour, limiting, after a defined interval of time, the otherwise lawful user of the neighbour's own property, is a right which cannot be natural, but must be acquired.

(*c*) In the case of affirmative easements and of window lights, after twenty years' user of a special kind a presumption of right arises, a possible lawful origin is inferred.

(*d*) The twenty years' rule, which is of comparatively recent application, is not a positive proprietary law, but is in truth nothing but a *canon of evidence*.

(*e*) The form in which the presumption built upon a twenty years' enjoyment has usually been framed is that of a lost grant or covenant according as the right claimed is to the affirmative or negative easement.

(*f*) In the case of affirmative easements the presumption recommended by the law is founded not on the consent of the adjoining owner, first given

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[1] *Ibid.*, p. 779.

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during the twenty years' user, but on some lawful origin preceding the earliest act of enjoyment; in which sense it is inaccurate to speak of such rights arising from the twenty years' acquiescence of the servient owner. His acquiescence for twenty years is nothing more than evidence of the previous existence of the right.

(*g*) The presumption of a lost grant or covenant is nothing more than a rebuttable presumption of fact or an artificial canon of evidence.

(*h*) The twenty years' rule is as applicable to the claim of support for modern buildings, as to affirmative easements and window lights.

(*i*) Presumed consent on the part of the adjoining owner is the foundation of the modern, as well as the ancient, title to support for buildings.

(*j*) The law deals with support to buildings and with light in the same way, regarding them as resting on enjoyment capable on the whole of interruption, and capable, therefore, of ripening into a right where interruption does not occur.

(*k*) The enjoyment must be *nec vi, nec clam, nec precario*. The user must be open whether the support required remains the same as at the commencement of the user, or the weight of the building is increased in any respect. The publicity or openness of the user is the real test.

(*l*) The defendant may disprove the user, or its quality, or in the last resort he can, while admitting the user, attempt to answer the presumption of some lawful origin, a task which he will find difficult inasmuch as the mere proof of the absence of any covenant under seal is not conclusive against the plaintiff.

Finally, Bowen, J., considered that the course which Lush, J., had taken was wrong, and that he should have directed the jury to find whether the enjoyment was in fact open.

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The House of Lords was unanimous in affirming the judgment of the Court of Appeal.

Lord Selborne, L.C.

Lord Selborne, L.C.,[1] expressed the opinion that the right claimed in suit was an easement and one not merely of a negative kind, but also of an affirmative character, in which view the right might be deemed within the Prescription Act.

He agreed with the view taken by Lush, J., by the majority of the judges in the Court of Appeal, and by all the seven judges—unless Bowen, J., who preferred to rely upon the equitable doctrine of acquiescence was an exception—that a grant, or some lawful title equivalent to it, ought to be presumed after twenty years' user.

With reference to the doctrine of *clam* on which there had been much difference of opinion, and to the inquiry on this part of the case as to the nature and extent of the knowledge or means of knowledge which a man ought to be shewn to possess, against whom a right of support for another man's building is claimed, it may be useful to summarise the Lord Chancellor's conclusions as follows:—

(*a*) A man cannot resist or interrupt that of which he is wholly ignorant. But a man ought to be presumed to have knowledge of the fact, that, according to the laws of nature, a building cannot stand without vertical or, ordinarily, without lateral support.

(*b*) When a new building is openly erected on one side of the dividing line between two properties, its general nature and character must be visible to, and ascertainable by, the adjoining proprietor during the course of its erection.

(*c*) And so, as in the present case, where a private dwelling-house is pulled down and a building of an entirely different character erected in its place, the adjoining owner must have imputed to him knowledge that a new and enlarged easement of support, whatever may be its extent, is going to be

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[1] *Ibid.*, p. 790.

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acquired against him, unless he interrupts or prevents it.

(*d*) Possessing this knowledge it is not necessary that the adjoining owner should have particular information as to those details of structure on which the amount or incidence of the weight of the building may more or less depend.

(*e*) It is open to him to make inquiries, and he has his remedy if information is improperly withheld, false or misleading information given, things done secretly or surreptitiously, or material facts suppressed.

(*f*) When a building is adapted to a particular use it is always liable to happen that the construction of the building requires more lateral support than would be necessary if it were otherwise constructed, and the knowledge that this may or may not happen is enough, if the adjoining owner makes no inquiry.

The Lord Chancellor in conclusion thought that the kind and degree of knowledge which the defendants must necessarily have had was sufficient; that nothing was done *clam*, and that the evidence did not raise any question which ought to have been submitted to the jury.

Lord Penzance[1] considered that Lush, J., had drawn the correct inference from the authorities, though they were by no means uniform, that an absolute right to support is acquired by twenty years' enjoyment, independent of grant, acquiescence, or consent. Lord Penzance.

In agreement with Fry, J., he was not satisfied that the principle upon which such authorities rested were satisfactory or justifiable, but he felt the less difficulty in acquiescing in them as they established the existence of the right after twenty years which, if the matter were *res integra*, he should have held to exist as soon as the plaintiffs' house was built.

Lord Blackburn[2] took the view that the right in suit could Lord Blackburn.

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[1] *Ibid.*, p. 802.

[2] *Ibid.*, p. 808.

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be more properly described as a rigit of property, which the adjoining owner is bound to respect, than as an easement, or a servitude *ne facias* restricting the mode in which the adjoining owner is to use his land, but thought it made little difference as to which name it was called by.

He agreed that a building which had enjoyed support for more than twenty years under the circumstances and conditions required by the law of prescription, acquired the same right to such support as an ancient house would have done.

He thought that the fiction of a lost grant was a long-established law that the Courts were bound to administer, and that where the evidence made it questionable whether the enjoyment had been open, peaceable, and continual, the jury might be asked to find, as a fact, whether the enjoyment was of that kind.

But he could not agree that the jury should be told that if the enjoyment had been such as to raise a presumption of a right they might find a grant whether they believed in its existence or not; but if they choose to be scrupulous, they need not so find.

He considered that the principle upon which prescription was founded extended beyond the ground of acquiescence or laches, that prescription was a positive law, and that a *de facto* enjoyment of a house for the period and under the conditions prescribed by law, could not be negatived by proof that a grant had not been made.

As regards the principle of open enjoyment, he considered it sufficient that the enjoyment should be sufficiently open to make it known that some support was being enjoyed by the building.

That would be enough to put the adjoining landowner on the exercise of his rights, if he desired to prevent a restriction of them, not usually of any consequence. On this ground he thought the only question for the jury was whether the building had for more than twenty years openly and without concealment, stood as it was, and enjoyed without interruption the support of the neighbouring soil.

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Lord Watson[1] was of opinion that the right in question was an easement and could be acquired by peaceable and uninterrupted enjoyment for the prescriptive period of twenty years.

As already mentioned, he regarded the easement as an affirmative one.[2]

He agreed with the House in thinking that the enjoyment of the plaintiffs had been such as to create the easement.

Lord Coleridge[3] contented himself with expressing his concurrence in the conclusions arrived at by the House.

Propositions deducible from *Angus* v. *Dalton*.

The following propositions of law may be deduced from *Angus* v. *Dalton*[4]:—

(*a*) That the right to vertical or lateral support for a building by land is an easement.[5]

(*b*) That the right may be acquired by enjoyment for twenty years, either of the support required by a house as it was originally built, or of any increased support required by a change in its construction.

(*c*) That the enjoyment must be peaceable, uninterrupted, as of right, without concealment, and without deception, and sufficiently open to make it known that some support is being enjoyed by the building.

(*d*) That if the enjoyment possesses those elements of publicity and honesty, the erection of the building, or a change in its construction increasing the pressure on the servient tenement, is sufficient notice of the original or increased amount of support required.

(*e*) That a *de facto* enjoyment of a house for the period and under the conditions prescribed by law raises an absolute presumption in favour of the dominant

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[1] [illegible]

[2] *See supra*, *Scott* (1[illegible], A.

[3] (1881) 6 App. Cas., p. 790.

[4] (1878-1881) 3 Q. B. D., 85; 4 Q. B. D., 162; *Dalton* v. *Angus*, 6 App. Cas., 740.

[5] The rights to vertical and lateral support must stand on the same footing: *see* *Rogers* v. *Taylor* (1858), 2 H. & N., 828; 27 L. J. Exch., 173; *Bonomi* v. *Backhouse* (1859), E. B. & E., 646, affirmed on error *sub nom.* *Backhouse* v. *Bonomi* (1861), 9 H. L. C., 503; and *Angus* v. *Dalton* (1878), 3 Q. B. D. at p. 99.

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owner which cannot be rebutted by proof that a grant has not been made.

(*f*) That (excepting the opinion of Lord Selborne) an easement of support for a building by land is more properly to be regarded as a negative easement than as an affirmative easement, and, that, in view of its special negative character,[1] it does not fall within the Prescription Act, but arises from a presumption of grant or covenant from which prescription under the Act is quite distinct.[2]

(*g*) That the easement of support for a building by land and the easement of light are analogous and their acquisition is governed by the same principles.

Easements of extraordinary support for buildings by land.

The question remains to be considered as to whether the foregoing principles are equally applicable to the acquisition of what may be termed easements of extraordinary support, *i.e.* support of an unusual and extraordinary kind.

Here the question turns on the application of the rule that user which is secret raises no presumption of knowledge on the part of the adjoining owner.

Partridge v. *Scott*.

The case of *Partridge* v. *Scott*,[3] cited with approval by the judges in *Dalton* v. *Angus*,[4] has an important bearing on this point. There a right of support was claimed in respect of an ancient house standing on land which had been excavated within twenty years of the institution of the suit. There was no evidence to shew when the excavation had taken place, but it was obvious that the effect of the excavation had been to throw a greater burthen of support on the adjoining land than if the subjacent soil had remained in its natural position. Both parties were ignorant of the excavation. The Court in dismissing the suit expressed the opinion that the plaintiff in order to succeed was bound to prove an enjoyment for twenty

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[1] *See* particularly the opinion of Fry, J., 6 App. Cas., at p. 776.

[2] *See per* Lord Westbury in *Tapling* v. *Jones* (1868), 11 H. L. C., 304.

[3] (1838) 3 M. & W., 220. *See* also *Hide* v. *Thornborough* (1846), 2 C. & K., 250; and *Humphries* v. [illegible] (1848), 12 Q. B., 739; 20 L. J. Q. B., 10, where knowledge is spoken of as a necessary condition of the easement of support.

[4] (1881) 6 App. Cas. at pp. 744, 753, 755, 757, 766, 784.

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years of the increased support after the defendants might have been, or were, fully aware of the facts.

From this expression of opinion and the observations of the judges in *Dalton* v. *Angus*,[1] it may fairly be inferred that, assuming the knowledge, or presumed knowledge, of the adjoining owner, an easement of extraordinary support may be acquired by twenty years' uninterrupted enjoyment.

To the foregoing subject is closely allied that of the dominant owner's liability for his own acts or omissions to which before the enlarged easement is acquired, the injury caused by the withdrawal of support is referable. The dominant owner has no right to increase the burthen imposed on the servient tenement. If by an omission to repair or by a changed construction of the house, or by some other act or omission, he increases the amount of support required from the adjacent land, and if, during the period of acquisition of the enlarged easement, an injury, by withdrawal of support, is done to the dominant tenement which would not have happened but for such act or omission on the part of the dominant owner, no right of action arises against the adjoining owner.[2] But if, after the acquisition of the right, a withdrawal of support causes an injury to the house, or if before such acquisition a negligent withdrawal causes such injury, the dominant owner is entitled to damages, and it is no answer to say that the house was so infirm that it would soon have fallen of itself, for no man has a right to accelerate the fall of his neighbour's house.[3]

Acquisition by presumption of law on a severance of the tenements.

An easement of support for a house by adjacent land also arises where both house and land belong to the same owner, and the house is conveyed and the land retained. In such

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[1] *Ibid.*

[2] *Partridge* v. *Scott* (1838), 3 M. & W., 220; *Corporation of Birmingham* v. *Allen* (1877), 6 Ch. D., 293; 46 L. J. Ch., 678. Nor is an action maintainable against a third person whose excavations on his own land by reason of the acts or omissions of the dominant owner, or of the adjoining and intermediate owner, have withdrawn the support afforded to the dominant tenement by the adjoining land, *see Corporation of Birmingham* v. *Allen*, *ubi sup.*

[3] *Partridge* v. *Scott*, *ubi sup.*; *Dodd* v. *Holme* (1834), 1 A. & E., 493.

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a case the grantee by implication of law, acquires a right of support for the house by the adjacent land, on the principle that the grantor is presumed to grant to the grantee all that is necessary and essential for the enjoyment of the house, and that neither he nor any who claim under him can derogate from his grant by using the land in such a way as to injure what is necessary and essential to the house.[1]

Further, an easement of support for a house by adjacent land can arise by implication on a severance of the tenements, not only where the house is already in existence, but where the surface is conveyed for the expressed purpose of building.[2]

Presumption rebuttable.

The presumption may be rebutted by any express words in the deed, or by necessary intendment from anything contained in the deed shewing it was not the intention of the parties that there should be any right to support.[3]

Application of same principle to division of building into floors or flats.

Upon the same principle if a building is divided into floors or "flats" separately owned, the owner of each upper floor or flat is entitled to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself.[4]

The proprietor of the ground floor is bound to keep it in such repair as is necessary for it to support the superincumbent weight, and the owner of the upper story or flat is bound to maintain that as a roof or cover for the lower.[5]

Right of support limited to adjoining land.

The right of support for a house from land is limited to that extent of land, whether wide or narrow, the existence of

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[1] *Dugdale* v. *Robertson* (1857), 3 K. & J., 695; *Caledonian Ry. Co.* v. *Sprot*, 2 Macq. Sc. App., 449; *Dalton* v. *Angus* (1881), 6 App. Cas., p. 792, 826; and *see* Chap. VI, Part IV, B. I (*a*) (2). As to what is the law if the grantor retains the house and grants the adjacent land, *see* Chap. VI, Part IV, B. I (*b*).

[2] *Elliott* v. *North-Eastern Railway Co.* (1860-1863), 29 L. J. Ch., 808; on App., 30 L. J. Ch., 160; 10 H. L. C., 333; *Caledonian Ry. Co.* v. *Sprot*, 2 Macq. Sc. App., 449; *Siddons* v. *Short* (1877), 2 C. P. D., 572; *Angus* v. *Dalton* (1877), 3 Q. B. D., 116; *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 792; *Rigby* v. *Bennett* (1882), 21 Ch. D., 559.

[3] *Angden* v. *Seddon* (1875), L. R. 10 Ch. App., p. 401.

[4] *Humphries* v. *Brogden* (1850), 12 Q. B. at pp. 747, 756; 20 L. J. Q. B. at p. 13; *Caledonian Ry. Co.* v. *Sprot*, 2 Macq. Sc. App., 449; *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 793.

[5] *Humphries* v. *Brogden* (1850), 12 Q. B., at p. 756; 20 L. J. Q. B. at p. 17.

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which in its natural state is necessary for the support of the house.[1]

Beyond this limit the land which is liable for the support does not extend, and landowners whose lands are situated beyond this limit, cannot be rendered liable for operations on their own lands which, by reason of acts committed on the intervening land, have injured the dominant tenement.[2]

Extent of prescriptive right to support.

The extent of the prescriptive right to support is to be measured by the degree of support enjoyed during the period of acquisition.[3]

(2) Rights to support where natural rights do not exist.

(a) *Rights to support to buildings by buildings.*

The right to support for buildings by buildings has been termed an easement of a highly artificial character, and of infrequent occurrence, inasmuch as properly constructed houses do not, as a rule, depend for their stability upon the existence of adjoining houses.[4]

From this point of view the frequently unavoidable secrecy of the user demonstrates the difficulty, if not impossibility, of acquisition.[5]

Acquirable by prescription.

But there is no doubt that the easement may be acquired in special circumstances, by enjoyment, open and uninterrupted, and as of right, and had for a period of twenty years.[6]

In such cases the principles which apply to the easement of support for a building by land are equally applicable to this easement.[7]

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[1] *Corporation of Birmingham* v. *Allen* (1877), 6 Ch. D., 284; 46 L. J. Ch., 673.

[2] *Ibid.*

[3] *See Dalton* v. *Angus* (1881), 6 App. Cas. at pp. 752, 779, and Chap. VIII, Part I, B.

[4] *Angus* v. *Dalton* (1878), 4 Q. B. D. at p. 167.

[5] *Ibid.*

[6] *Peyton* v. *Mayor of London* (1829), 9 B. & C., 736; *Brown* v. *Windsor* (1830), 1 C. & J., 20; *Solomon Vintners' Co.* (1859), 4 H. & N., 585; *Angus* v. *Dalton* (1878), 4 Q. B. D., p. 168; *Le Maitre* v. *Davis* (1881), 19 Ch. D., 281; *Tone* v. *Preston* (1883), 24 Ch. D., 739; *Gordhan* v. *Chotalal* (1883), I. L. R., 13 Bom., 79.

[7] *Le Maitre* v. *Davis* (1881), *ubi sup.*

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Peyton v. *Mayor of London.*

In *Peyton* v. *Mayor of London*,[1] the decision turned in a great measure upon the form of the declaration which was defective, but the judgment points to the conclusion that upon proper evidence directed to a properly drawn declaration a grant of the right of support claimed might have been presumed.

Solomon v. *Vintners Co.*

In *Solomon* v. *Vintners Co.*,[2] where the right of support for a house from another house not immediately adjoining was claimed, Pollock, C.B., in giving the judgment of the Court, excepting that of Bramwell, B., though himself not in favour of the right under any circumstances, admitted that if the house removed had been next adjoining the plaintiff's, he would have felt a difficulty upon the cases and dicta in deciding against the right claimed.

Bramwell, B., decided the case upon the ground that the facts as proved did not disclose an open enjoyment.

Le Maitre v. *Davis.*

In *Le Maitre* v. *Davis*,[3] the plaintiff's vault extended to and underlay the defendant's premises. Adjoining the vault was a cellar appertaining to, and occupied with, the defendant's premises, the eastern wall of the vault being supported by the western wall of the cellar to the knowledge of both parties. Both tenements were ancient. It was decided that a right of support for the plaintiff's vault by the defendant's cellar had been acquired.

Tone v. *Preston.*

In *Tone* v. *Preston*,[4] the support was obvious, and had the enjoyment been as of right, an easement would have been acquired. But the Court thought it impossible to affirm the acquisition of an easement where a building stands upon land as to a portion of which the party claiming the easement admits that at any time upon three months' notice, he is bound to do something which is inconsistent with the continuance of the building.

Gordhan v. *Chotalal.*

In *Gordhan Dalpatram* v. *Chotalal Hargovan*,[5] the acquisition of an easement of support for a building by a building is

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[1] (1829) 9 B. & C., 725.
[2] (1859) 4 H. & N., 598.
[3] (1881) 19 Ch. D., 281.
[4] (1883) 24 Ch. D., 739.
[5] (1888) I. L. R., 13 Bom., 79.

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recognised, though the relative position and structure of the two buildings in that case made a decision in favour of an easement impossible.

There was clearly no support of the plaintiff's house by the defendant's wall, and the mere fact of building a house close to the defendant's wall gave the plaintiff no right over the wall.

Though easements of support for buildings by buildings may undoubtedly arise in the foregoing manner, the origin of the rights may usually be said to lie in the disposition of the two tenements by the original owner of both.

Usually acquired by presumption of law on severance of tenements.

On a severance of the two tenements reciprocal easements of support arise by implication of law in favour of grantor and grantee.[1]

Such rights are in the nature of easements of necessity.[2]

In *Richards* v. *Rose*,[3] it was decided that where a number of houses belonging to the same person are built together, and obviously require mutual support, each of the other, for their common protection and security, and the ownership is afterwards divided or subdivided by mortgage, sales, devise, or other means, a legal presumption arises in favour of a mutual easement of support either as between the grantor and grantee or as between the grantees themselves.[4]

Richards v. *Rose*.

And this right is wholly independent of the question of the priority of the grantees' titles.[5]

The presumption in favour of the right can be rebutted by express words in the deed, or by necessary intendment from anything contained in the deed shewing it was not the

Presumption rebuttable.

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[1] *Richards* v. *Rose* (1853), 9 Exch., 218; 23 L. J. Exch., 3; *Gayford* v. *Nicholls* (1854), 9 Exch., 702 (708); 23 L. J. Exch., 205; *Suffield* v. *Brown* (1864), 4 De G. J. & S. at p. 198; *Angus* v. *Dalton* (1877), 3 Q. B. D. at p. 116; (1878), 4 Q. B. D. at pp. 168, 182; *Dalton* v. *Angus* (1881), 6 App. Cas. at pp. 792, 826; *Wheeldon* v. *Burrows* (1879), 12 Ch. D. at p. 59.

[2] *See* Chap. VI, Part IV, B. I (*a*) (2).

[3] (1853) 9 Exch., 218; 23 L. J. Exch., 3.

[4] *Ibid.* The same principle has been applied to the divided moieties of a party-wall, *Jones* v. *Pritchard* (1908), 1 Ch., 630 (635, 636); 24 Times L. R., 309 (310).

[5] *Richards* v. *Rose*, *ubi sup.*

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intention of the parties that there should be any right to support.[1].

Servient owner not bound to maintain his tenement in repair.

An easement of support to a building by a building does not impose any obligation on the owner of the servient tenement to maintain it in such a condition of repair as may be required for the undiminished support of the dominant tenement.[2]

This proposition is only another way of expressing the general rule that it lies on the dominant, and not on the servient, owner to keep the servient tenement in such repair as is necessary for the preservation of the easement,[3] and is a necessary corollary to the doctrine that the owner of the supporting land or building is bound by no higher duty than to abstain from actively interfering with his neighbour's support and causing him damage.[4]

(b) Right to support to surface land by subjacent water.

Right to support to surface land by subjacent water.

Though there is a natural, or common law, right of support to surface land by subjacent land,[5] no such natural right can exist where the support is afforded by water instead of land.[6]

Thus, there is nothing to prevent a man draining his land if he considers it necessary or convenient to do so, and thereby drawing off the subjacent water from under his neighbour's surface land.[7]

Methods of acquisition.

In such a case the right to support must be founded on an easement which, it seems, may be acquired either by express

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[1] *Aspden* v. *Seddon* (1875), L. R., 10 Ch. App., 394.

[2] *Pomfret* v. *Ricroft* (1681), 1 Saund., 322; Wms. Notes, 557; *Taylor* v. *Whitehead* (1781), 2 Dougl. (749); *Colebeck* v. *Girdlers Co.* (1875), 1 Q. B. D., 234; 45 L. J. Q. B., 225; *Jones* v. *Pritchard*, (1908), 1 Ch., 630 (637); 24 Times L. R., 309 (310).

[3] *See* further, Chap. VIII, Part III.

[4] As to the distinction between passive omission and active interference, *see* Notes to *Pomfret* v. *Ricroft*, *ubi sup.* As to the obligation imposed on the servient owner, *see supra*, Part IV, I, and Chap. V. Part IV.

[5] *See* Chap. V, Part IV.

[6] *Ibid.*, under "No natural right of support to land by subjacent water."

[7] *Popplewell* v. *Hodkinson* (1869), L. R., 4 Exch., 248. For the case of a surface stream supported by subjacent water and the rights connected therewith, *see* Chap. V, Part III, D.

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grant, or, under special circumstances, by implication of law on a severance of the two tenements.[1]

As regards the latter method of acquisition, the existence of the easement must depend on an obligation arising out of the rule that a man cannot derogate from his own grant, and preventing the grantor from doing anything whatever with his own land which might have the effect of rendering the land granted less fit for the special purpose for which it had been granted than it otherwise might have been.[2]

Such an obligation will only be implied where it is contemplated by both parties at the time of the severance that a particular act complained of will not be done upon the adjoining land.[3]

Law if existence of the water is accidental.

Where, however, the existence of the subjacent water is due to accident, the party claiming the support has no right to speculate on its retention and consequently no right to complain of its withdrawal, unless its retention be expressly provided for in the conveyance.[4]

II.—Easements conferring rights to take away support.

Easements to let down the surface.

As already observed the right to take away support may be restrictive either of the natural right to support for land by land,[5] or of the easement of support for buildings by land. The easement may be described as the right to withdraw support from land, or from land and buildings resting thereon by the disturbance of subjacent or adjacent soil.[6] The right is also called an easement to let down the surface.

Usually acquired in mining operations.

The right to take away vertical support chiefly arises in connection with mining operations carried on below the

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[1] *Elliott* v. *North-Eastern Ry. Co.* (1860–1863), 29 L. J. Ch., 808; on appeal, 30 L. J. Ch., 160; on appeal, 10 H. L. C., 333; *Popplewell* v. *Hodkinson* (1869), *ubi sup.*

[2] *Popplewell* v. *Hodkinson*, *ubi sup.*

[3] *Ibid.*

[4] *Elliott* v. *North-Eastern Ry. Co.* (1860–1863), 29 L. J. Ch., 808; on App., 30 L. J. Ch., 160; on App., 10 H. L. C., 333.

[5] *See* Indian Easements Act, s. 7, ill. (*e*), App. VII.

[6] *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; *Aspden* v. *Seddon* (1875), L. R., 10 Ch. App., 394; *Bell* v. *Love* (1883), 10 Q. B. D., 547; *Dixon* v. *White* (1883), 8 App. Cas., 833.

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surface of the land in cases where the surface and the mining rights have passed into different hands.[1]

Relative and respective riguts of owners of surface lands and subjacent minerals.

The relative and respective rights of the owners of surface lands and of subjacent minerals have, from time to time, been the subject of considerable discussion in the Courts, and the law has been ascertained and settled by a series of decisions,[2] the effect of which may be summarised in the following propositions :—

(1) That although the owner of the surface has a *primâ facie* right to have his surface supported, and, correlatively, the owner of the minerals is under a *primâ facie* obligation to get them without causing injury to the owner of the surface, the presumption in favour of the latter may be rebutted by an authority contained in the instrument of severance to disturb or let down the surface.

(2) That such authority must be given by express words or by necessary implication.[3]

(3) That the question whether or not an easement to let down the surface has been granted to, or reserved by, the mineral owner, is one of construction in each case,[4] and the same principles apply whether the instrument of severance is a lease, or a deed of grant or reservation, or a legislative enactment (which is really a

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[1] *See* the cases cited in the next footnote.

[2] *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; *Duke of Buccleugh* v. *Wakefield* (1870), L. R., 4 H. L., 377; *Buchanan* v. *Andrew* (1873), L. R., 2 H. L. Sc., 286; *Aspden* v. *Seddon* (1875), L. R., 10 Ch. App., 394; *Davis* v. *Treharne* (1881), 6 App. Cas., 460; *Dixon* v. *White* (1883), 8 App. Cas., 533; *Love* v. *Bell* (1884), 9 App. Cas., 286; *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1904), 2 Ch., 419; (1906), App. Cas., 305; *Sitwell* v. *Earl of Londesborough* (1905), 1 Ch., 460; *Butterley Co., Ltd.* v. *New Hucknall Colliery Ltd.* (1908), 2 Ch., 475.

[3] Thus, where there has been a severance, but there is nothing to shew how and when the severence took place, the natural right of support continues to exist, *Manchester Corporation* v. *New Moss Colliery, Ltd.* (1906), 1 Ch. at p. 291. As to the natural right of support, *see* further, *infra*, Chap. V, Part IV.

[4] But a new grant is more favourable to the existence of the easement than a mere reservation, *Bishop Auckland Industrial Co-operative Co.* v. *Butterknowle Colliery Co.* (1904), 2 Ch. at p. 425. As to the mode of construction, *see* Chap. VI, Part III, and the last-cited case, (1904) 2 Ch., 419; (1906) App. Cas., 305.

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statutory agreement between the parties), or an award.[1]

(4) The absence of any provision for compensation is strong evidence against the easement. As a corollary to this, the existence of an express provision for compensation for letting down the surface does not necessarily operate to confer the easement.[2]

(5) Where there have been a statutory allotment of the surface, and a reservation to the mineral owner to get the minerals "as fully and freely as he might have "done if the Act had not been passed," such reservation will not operate in favour of the easement merely because the only previous liability was to leave sufficient pasturage, but must be read as subject to the maxim, "*Sic utere tuo ut alienum non lædas.*"[3]

Power reserved by owner of minerals to let down surface, not void.

It was thought at one time that where the owner of the land reserved the minerals and granted the surface, a power reserved by him to take the minerals so as to destroy the surface by taking away all support was void, as being repugnant to, and derogating from, the grant, though it was always undoubted that a similar power granted in the converse case of the owner retaining the surface and granting the minerals would be good.

But it is now clearly established that the right to let down the surface may exist, not only where the minerals are granted, but where they are retained, by the owner of the land, and the grant may shew that the surface is held on the terms that the owner of the minerals is free to remove the whole of them without leaving any support to the surface, either, according

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[1] *See* particularly, *Bishop Auckland Industrial Co-operative Co.* v. *Butterknowle Colliery Co.* (1904), 2 Ch., 419 (425); (1906) App. Cas., 305 (313). As to easements arising by virtue of legislative enactment, *see* Chap. VI, Part VI.

[2] *See* particularly, *New Sharlston Collieries Co.* v. *Earl of Westmoreland* (1904), 2 Ch., 443, 447; *Bishop Auckland Industrial Co-operative Co.* v. *Butterknowle Colliery Co.* (1904), 2 Ch., 419; (1906), App. Cas., 305; *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.* (1908), 2 Ch., 475.

[3] *Gill* v. *Dickinson* (1880), 5 Q. B. D., 159; *Bishop Auckland Industrial Co-operative Co.* v. *Butterknowle Colliery Co.* (1904), 2 Ch. at pp. 425, 426.

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as may be stipulated, with or without making any compensation for the damage thus occasioned.[1]

Possible acquisition by user.

It appears that long enjoyment of minerals will raise the presumption of a legal right to them, added to a legal right to get them, and that the question whether there is acquired the accompanying right to take away the support of the surface land must depend on the particular circumstances of the case, such as whether or not the right to get the minerals could have been exercised without disturbing the surface, and without the possibility of supporting the surface by artificial means.[2]

C.—The Doctrine of Negligence.

Negligence.

It may be useful at this stage to summarise the law relating to negligence as applying to the question of support.

After the acquisition of an easement of support the question of negligence is immaterial, for it is clear law that if the disturbance of the subjacent or adjacent soil actually causes injury to the dominant tenement the owner thereof is entitled to relief,[3] notwithstanding that the utmost care and skill may have been exercised, and every precaution taken, by the person responsible for such disturbance, or that the soil on which the building stands may have been propped up, or that if propped up, the propping may have been difficult.[4]

Briefly, after the acquisition of the easement there is an absolute liability for damage resulting from the withdrawal of the support.

It is before, however, the right to support has matured

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[1] *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; *Buchanan* v. *Andrew* (1873), L. R., 2 H. L. Sc., 286; *Dixon* v. *White* (1833), 8 App. Cas., 833.

[2] This method of acquisition was suggested by Lord Wensleydale in *Rowbotham* v. *Wilson* (1860), 8 H. L. C. at p. 363, though a decision on the point was unnecessary owing to the existence of a deed by which the plaintiffs were held bound.

[3] *Bonomi* v. *Backhouse* (1859), E. B. & E., 646, affirmed on error *sub nom. Backhouse* v. *Bonomi* (1861), 9 H. L. C., 503; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas., 127; *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson* (1908), App. Cas., 27.

[4] *See* Kerr on Injunctions, 4th Ed., at p. 163.

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that the question of negligence becomes material in determining whether the disturbance complained of is an actionable wrong. Although before the acquisition of the easement there is no obligation of support, and consequently no absolute liability for damage resulting from the withdrawal of support, yet there must always be an observance of the maxim, "*Sic utere tuo ut alienum non lædas*," and it is by the observance or breach of that maxim coupled with the use of, or the omission to use, due care and precaution, that the question of negligence has to be determined.[1]

But it must not be forgotten that *damnum absque injuriâ* gives no cause of action.[2] There must be the wrong done as well as the damage sustained. Thus, if a man removes his neighbour's support to which his neighbour has no right in a proper and lawful manner and thereby causes him damage, his neighbour has no ground of action. But if he be negligent in removing such support, and damage be caused to his neighbour, then the latter has good ground of action as there are both *damnum* and *injuriâ*.[3]

Rylands v. *Fletcher*.

The case of *Rylands* v. *Fletcher*,[4] though not a case relating to support, is important as illustrating the principles upon which the doctrine of negligence is founded.

These principles are that where the owner of land uses it, without wilfulness or negligence, for any purpose for which it may in the ordinary and natural course of the enjoyment of land be used, he will not be liable if the result of such user is to cause damage to his neighbour.[5]

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[1] *See infra*, *Rylands* v. *Fletcher* (1868), L. R., 3 H. L., 330; *Acton* v. *Blundell* (1843), 12 M. & W., 324, and the other cases cited in the same footnote. *See* also *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (1907), App. Cas., 476; *Jones* v. *Pritchard* (1908), 1 Ch., 630; 24 Times L. R., 309.

[2] *Rex* v. *Pagham Commissioners* (1828), 8 B. & C., 355; 32 R. R., 406; *Acton* v. *Blundell* (1843), 12 M. & W., 324 (354).

[3] *Rex* v. *Pagham Commissioners* (1828), 8 B. & C. at p. 362, 32 R. R. at p. 411; *Acton* v. *Blundell*, *ubi sup.*

[4] (1868) L. R., 3 H. L., 330.

[5] *See* also *Acton* v. *Blundell* (1843), 12 M. & W., 324; *Smith* v. *Kenrick* (1849), 7 C. B., 515; *Wilson* v. *Waddell* (1876), 2 App. Cas., 95; *The Salt Union, Ltd.* v. *Brunner, Mond & Co.* (1906), 2 K. B., 822. And if the user is lawful the motive is immaterial. *Bradford Corporation* v. *Pickles* (1895), App. Cas., 587.

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If, however, he makes of his land a use which is not natural, or brings something upon it which was not naturally upon it, and is in itself dangerous, and likely to do mischief if not kept under proper control, though in so doing there be no personal wilfulness or negligence on his part, he is liable for all the damage which is occasioned by his acts.[1]

The latter proposition, though undoubtedly connected with the application of the above-mentioned maxim to the enjoyment of property, refers rather to the improper or non-natural use of a man's property than to negligence in the proper or natural use of it, and is consequently outside the scope of the present topic. Incidental reference to it here is necessary only so far as it bears on the question of one neighbour's liability to another for damage to the latter's building caused by an improper or dangerous use of the former's property, such as, for example, the storage of explosive or inflammatory substances.

Negligence in relation to removal of support.

The question of negligence in relation to the removal of support to buildings is not free from difficulty and uncertainty.

Out of the decisions bearing on this subject the following questions arise:—

(*a*) As to whether the person repairing or pulling down his own house or excavating on his own ground is under any obligation to do more than exercise due care, skill, and caution within the limits of his own land, or whether it is his duty under particular circumstances to protect his neighbour's house from the consequences of the operations;

(*b*) as to whether he is bound to give his neighbour notice of his intention to repair, pull down, or excavate, as the case may be, so as to afford his neighbour the opportunity of taking the necessary precautions against damage; and

(*c*) as to whether the state of knowledge on his part as to the existence or method of construction of his

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[1] *See Baird* v. *Williamson* (1863), 15 C. B. N. S., 376.

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neighbour's house affects the amount of care, skill, and caution to be exercised by him.

In each case negligence is a question of fact depending on all the surrounding circumstances of the case and may be rebutted.

It appears to be an open question as to how far the doctrine of negligence is to apply in cases where a man is doing something for the ordinary, convenient, comfortable, or necessary enjoyment of his own property, and whether some of the precautions which he may take, in so doing, with regard to his neighbour, are not to be referred to considerations of neighbourliness rather than to any legal obligation.

In such cases the extent of his liability would depend on the extent of his legal duty, for the question of liability for negligence does not arise until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.[1]

It seems impossible to deduce any fixed rule from the authorities, except in one or two special respects, or to state any other conclusion than that it is for the Court to decide on the particular facts in each case whether there has or has not been negligence.

In *Jones* v. *Bird*,[2] it appeared that a sewer which it became necessary for the defendants as Commissioners of sewers to repair, passed close to five houses adjoining that belonging to the plaintiff, and that a stack of chimneys belonging to one of those houses was built upon the arch of the sewer. In the execution of the work it became necessary to rebuild this arch, and in order to support the chimneys in the mean time, a transom and two upright posts were placed under them in order to support them, but without success. The chimneys fell, and, in consequence of their fall, the adjoining houses including the plaintiff's house fell also. *Jones* v. *Bird*.

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[1] *Le Lievre* v. *Gould* (1893), 1 Q. B., 497.

[2] (1822), 5 B. & Ald., 837.

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There was no specific notice given to the owner of the house to which the chimneys belonged of their dangerous state, or that it would be necessary for him to take them down. But there was a general notice to the inhabitants to secure their houses whilst the sewer was repairing.

The questions were whether the defendants had been negligent in securing the chimneys as they did, and whether they were under any obligation either to shore up the surrounding buildings, or to give specific notice to the owner of the chimneys of their peculiar construction and the danger arising from it.

The Court decided all three questions against the defendants. Bayley, J., said: "Now, the facts are, that the "defendants worked under a stack of chimneys, without "either properly securing them, or giving notice of their "danger to the owner in order that he might take them "down; this was improperly and negligently working the "sewer, for if a party does an act which is improper, unless "certain previous precautions are taken, he may fairly be "said to do that act improperly. As to the merits of the case "it is contended that the defendants are protected, if they "acted *bonâ fide* and to the best of their skill and judgment. "But that is not enough; they are bound to conduct themselves in a skilful manner."

This case goes further than the later authorities on the subject of protecting neighbour's houses and giving notice, but it may well be argued that a public sanitary body has a higher duty to perform than a private individual as well as greater power and liberty in its performance, such as the power to go into adjoining houses and the liberty to defray any expenses caused thereby out of the rates.

Peyton v. *Mayor of London*.

Peyton v. *Mayor of London*,[1] decided first, that, as the declaration had not charged want of notice of taking down the defendants' house as the injury complained of, the action could not be maintained upon the want of such notice supposing that, as a matter of law, the defendants were bound to

[1] (1829) 9 B. & C., 725.

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give notice beforehand—a point upon which the Court was not called upon to express any opinion; secondly, that as the plaintiff had not alleged or proved any right to have his house supported by the defendants, he was bound to protect himself by shoring, and could not complain that the defendants had neglected to do it.

It appeared in evidence that both houses were very old and decayed, and that this defective condition was known to both parties.

Walter v. *Pfeil*.

In *Walter* v. *Pfeil*,[1] although it was considered as settled that the owner of premises adjoining those pulled down must shore up his own and do everything proper for their preservation, yet the omission on his part to do so does not necessarily defeat an action, if the pulling down of the defendant's house is done irregularly and negligently so as to occasion greater risk to the plaintiff than in the ordinary course of the performance of the work would have been incurred.

This case appears to shew that in similar circumstances a plaintiff's omission to shore up would not necessarily amount to contributory negligence.

Massey v. *Goyder*.

Massey v. *Goyder*,[2] shews that a party giving notice to the occupier of the adjoining premises of his intention to pull down and remove the foundations of a building on part of the footing of one of the walls of which one of the walls of such adjoining premises rests, is not bound to use more than reasonable and ordinary care in the work or in any other way to secure the adjoining premises from injury, although from the peculiar nature of the soil he may be compelled to lay the foundation of his new building several feet deeper than that of the old.

The case does not decide that the defendants were bound in point of law to give notice, but that having done so and having used reasonable and ordinary care in the work, they were not liable.

Brown v. *Windsor*.

In *Brown* v. *Windsor*[3] where the plaintiff's house was built

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[1] (1829) 1 M. & M., 362.
[2] (1829) 4 C. & P., 161.
[3] (1830) 1 Cr. & J., 20.

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against the pine-end wall of the defendant's house by permission, and the defendant more than twenty years afterwards made an excavation in a careless and unskilful manner in his own land, near to this pine-end wall, whereby he weakened such wall and injured the plaintiff's house, it was held that an action on the case was maintainable for the injury, and Garrow, B., said: "There may be cases where a man altering "his own premises cannot support his neighbour's, and that "the support, if necessary, must be supplied elsewhere; in "such case he must give notice, and then, if any injury occur, "it would not be occasioned by the party pulling down, but by "the other party neglecting to take the precaution."

This is the only case on the question of notice in which notice is made a matter of legal obligation as between private individuals, and its effect must be regarded as considerably weakened by the later decision in *Chadwick* v. *Trower*.[1]

Dodd v. *Holme.*

In *Dodd* v. *Holme*[2] it was found that by reason of the negligence of the defendant in excavating his soil adjoining the ground upon which the plaintiff's house stood, the said house had been injured, and the Court decided that the defendant was liable, and that it was no answer on his part to say that the house would have fallen soon independently of the excavation, as a man has no right to accelerate the fall of his neighbour's house.

Chadwick v. *Trower.*

In *Chadwick* v. *Trower*,[3] above referred to, the facts were that the plaintiffs and defendant were owners of adjoining vaults and that the defendant had pulled down his vaults without giving notice to the plaintiffs of his intention to do so, and that the demolition of the defendant's vaults had caused injury to the plaintiffs.

The questions before the Court were, first, whether the defendant was bound to give the plaintiffs notice of his intention to pull down his vaults and, secondly, whether he was obliged to take such care in pulling down his vaults as that

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[1] (1839) 6 Bing. N. C., 1.
[2] (1834) 1 A. & E., 493.
[3] (1839) 6 Bing. N. C., 1.

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the adjoining vault should not be injured, having regard to the fact that there was no averment that the defendant had knowledge of its existence, or of the nature of its construction.

In the course of the argument for the plaintiffs Parke, B., observed that the duty of giving notice seemed to be one of those duties of imperfect obligation which are not enforced by the law,[1] and in the judgment of the Court which he delivered, reversing the judgment of the Court of Common Pleas, he said[2]: "The Lord Chief Justice in delivering the judgment of "the Court says, 'There is no allegation in this Court of any "'right of easement in *alieno solo*, which forms the ground of "'the plaintiffs' action in the first Court. And, as to the "'allegation that it was the duty of the defendant to give "'notice to the plaintiffs of his intention to pull down his wall, "'if he did not shore up himself, it is objected, *and we think* "'*with considerable weight*, that no such obligation results, as a "'mere inference of law, from the mere circumstance of the "'juxtaposition of the walls of the defendant and the plaintiffs.' "We also think it impossible to say that under such cir- "cumstances the law imposes upon a party any duty to give "his neighbour notice. We are inclined to think that the "second count of the declaration has made the breach of this "supposed duty a substantive ground for damage: and the "probability is that the main damage did result from the want "of notice; for it is obvious that, if notice had been given, "the plaintiffs might have taken precautions to strengthen "their vault. Inasmuch, therefore, as the damages are given "generally upon the whole declaration, we think the judgment "must be corrected and a *venire de novo* awarded. But sup- "posing that the improperly pulling down the defendant's "vaults and walls may be treated as the substantive cause of "action, and that the second branch of the argument that has "been urged on the part of the plaintiffs is well founded (which "we think it is not), then the question arises whether any such

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[1] *Ibid.* at p. 6.

[2] *Ibid.* at p. 9.

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"duty as that which is alleged to have been violated is by law "cast upon the defendant."

After setting out the plaintiffs' allegations of the duty cast on the defendant by reason of the proximity of his premises to those of the plaintiffs', and the alleged breach on the part of the defendant, the judgment proceeds: "The "question is whether the law imposes upon the defendant an "obligation to take such care in pulling down his vaults and "walls as that the adjoining vault should not be injured. "Supposing that to be so, where the party is cognisant of the "existence of the vault, we are all of opinion that no such "obligation can arise where there is no averment that the "defendant had notice of its existence, for one degree of care "would be required where no vault exists, but the soil is left "in its natural and solid state; another where there is a "vault; and another and still greater degree of care would be "required where the adjoining vault is of a weak and fragile "construction. How is the defendant to ascertain the precise "degree of care and caution the law requires of him if he has "no notice of the existence or of the nature of the structure?"

"We think no such obligation as that alleged exists in the "absence of notice, and, therefore, upon this ground also we "think the count is bad; and, consequently, there must be a "*venire de novo*."

Fairbrother v. *Bury Rural Sanitary Authority.*

In *Fairbrother* v. *Bury Rural Sanitary Authority*,[1] the plaintiff's house was built in 1874, and the defendants in 1883, acting under statutory powers, constructed a sewer under the road near the plaintiff's house, which, owing to the defendants' negligence in the construction of the sewer, was cracked and damaged. It was held that although the plaintiff was not entitled to any right of support for his house by way of easement, yet the defendants were bound to use due care in the exercise of their powers, and were, therefore, liable for negligence.

Effect of defendant's repairing damage before suit.

If there has been negligence, it is no answer to an action brought for damage caused thereby, to plead that the damage has been repaired.

[1] (1889) 37 W. R., 544.

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That would be merely evidence in reduction of damages.[1]

Duty of adjoining owner as to the preservation of his house.

The duty of the adjoining owner while repairing his house has been considered; it now remains to inquire whether as the owner of a house he owes his neighbour any legal obligation to keep it repaired in a lasting and substantial manner. The answer is in the negative. The only duty of the owner of a house, as such, is to keep it in such a state that his neighbour may not be injured by its fall.[2]

Liability for negligence of contractor.

On the question whether a man is responsible for the negligence of his agent, such as when a contractor is employed to do the particular work required, the conclusion to be drawn from the authorities appears to be that one person employing another is not liable for his casual or collateral negligence unless the relation of master and servant existed between them,[3] but that when a man causes something to be done, the doing of which casts on him a duty, he cannot avoid the responsibility of seeing the duty performed by delegating it to a contractor.[4]

He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him, if it is not performed, but he cannot relieve himself from liability to those injured by the failure to perform it.[5]

And it makes no difference whether the duty is imposed by the legislature or existed at law.[6]

Joinder of parties.

In an action for negligence against an adjoining owner where a contractor has been employed, it is the usual practice to join both employer and contractor as parties defendants, in

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[1] *Taylor* v. *Stendall* (1845), 7 Q. B., 634.

[2] *Chauntler* v. *Robinson* (1849), 4 Exch., 163.

[3] *Quarman* v. *Burnett* (1846), 6 M. & W., 499; *Hole* v. *Sittingbourne Ry. Co.* (1861), 6 H. & N., 488; *Pickard* v. *Smith* (1861), 10 C. B. N. S., 470; *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 829.

[4] *Hole* v. *Sittingbourne Ry. Co.* (1861), 6 H. & N., 488; *Pickard* v. *Smith* (1861), 10 C. B. N. S., 470; *Gray* v. *Pullen* (1864), 5 B. & S., 970; *Tarry* v. *Ashton* (1876), 1 Q. B. D., 314; *Bower* v. *Peate* (1876), 1 Q. B. D., 321; *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 829; *Le Maitre* v. *Davis* (1881), 19 Ch. D., 292; *Hughes* v. *Percival* (1883), 8 App. Cas., 443.

[5] *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 829.

[6] *Hole* v. *Sittingbourne Ry. Co.* (1861), 6 H. N., 488; *Gray* v. *Pullen* (1864), 5 B. & S., 970; *Bower* v. *Peate* (1876), 1 Q. B. D., 321.

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which case the plaintiff, if successful, would be entitled to a decree against both of them.[1]

Part V.—Easements relating to Party-walls.

"Party-walls."

It is thought that this chapter would not be complete without some reference to the cognate subject of easements relating to "party-walls."

In its popular sense a "party-wall" usually means the dividing wall between two tenements or buildings,[2] but the precise nature of the easements which are in any given case connected with it must depend, to some extent, upon the particular meaning assignable in law to the popular term.

Four legal definitions of "Party-wall." *Watson* v. *Gray*.

In point of law, the term "party-wall" has been declared to be capable of four different meanings, the last two of which, as they are stated by Fry, J., in *Watson* v. *Gray*,[3] have special reference to the present subject.

That learned judge explains[4] that a party-wall, according to legal conception, may mean "first, a wall of which the two "adjoining owners are tenants in common, as in *Wiltshire* v. "*Sidford*[5] and *Cubitt* v. *Porter*.[6] I think that the judgments "in those cases shew that that is the most common and the "primary meaning of the term. In the next place, the term "may be used to signify a wall divided longitudinally into two "strips, one belonging to each of the neighbouring owners, as "in *Matts* v. *Hawkins*."[7]

"Then, thirdly, the term may mean a wall which belongs "entirely to one of the adjoining owners, but is subject to an "easement or right in the other to have it maintained as a

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[1] *Bower* v. *Peate* (1876), 1 Q. B. D., 321; *Dalton* v. *Angus* (1881), 6 App. Cas. at pp. 821, 831; *Le Maitre* v. *Davis* (1881), L. R., 19 Ch. D., 292.

[2] *See infra*, Chap. IV, Part I, B (6).

[3] (1880) 14 Ch. D., 192.

[4] *Ibid.* at p. 194.

[5] (1828), 1 Man. & Ry., 404.

[6] (1829) 8 B. & C., 257 (265). In the absence of evidence of ownership of a party-wall, it is to be presumed that it belongs to the adjoining owners as tenants in common, *Standard Bank of British S. America* v. *Stokes* (1908), 9 Ch. D., 68; S. C. in 47 L. J. Ch., 554; 38 L. T. N. S., 672; 26 W. R., 492. As to the partition of such a party-wall, *see* *Mayfair Property Co.* v. *Johnston* (1894), 1 Ch., 508.

[7] (1813) 5 Taunt., 20. Here the presumption of a tenancy in common would be excluded.

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"dividing wall between the two tenements. The term is so "used in some of the Building Acts. Lastly, the term may "designate a wall divided longitudinally into two moieties, "each moiety being subject to a cross easement in favour of "the owner of the other moiety."

"In whichever of these senses the term is used some diffi- "culty arises. In the case of a longitudinal division between "the two neighbours, each of them, as was said in *Cubitt* v. "*Porter*,[1] has a right to pare away one moiety of the wall, "and if this was done, the moiety of the owner might be of "very little use to him. Again, if the wall belongs to the "adjoining owners as tenants in common, it may become the "subject of a partition, and then exactly the same difficulty "would arise. To meet this difficulty the fourth meaning of "the term 'party-wall' was suggested by the learned author of "the note to *Wiltshire* v. *Sidford*."[2]

Easement connected with third definition.

With reference to the third definition above stated, it is to be observed that the easement there mentioned is one which, apart from statutory provision, would usually come into existence either by express agreement, or by necessary implication therefrom, upon a severance of the two tenements, or buildings, by the common owner, just as on the grant of one or two buildings by the owner of both, the law will presume in favour of the grantee all such easements of support and other easements as are reasonably necessary for the purposes of the grant.[3] This easement to have the party-wall maintained as a dividing wall would amount to very much the same thing as an easement of support, but would differ from it in so far as it would impose on the owner of the servient tenement a direct duty to maintain the party-wall in a necessary condition of repair.[4]

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[1] *Ubi sup.*

[2] *Ubi sup.*, at p. 408. The notion of a cross easement is there suggested for the purpose of providing a remedy by an action on the case for any injury which might result to either neighbour by the other taking down his own moiety of the wall.

[3] *See Jones* v. *Pritchard* (1908), 1 Ch., 630 (635, 636); 24 Times L. R., 309 (310), and Chap. VI, Part IV, B. I (*a*), (*b*), B. III; Chap. VIII, Part I, B (1), (2), C (1).

[4] This is an instance of the exception to the general rule that the owner of the servient tenement is under no obligation to repair except where he is bound by express stipulation or by an easement to

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Easements connected with fourth definition.

In regard to the fourth definition of a party-wall as above stated, the cross easements connected therewith would, as in the case of the third definition, come into existence either by express agreement, or by implication therefrom, upon a division of the wall longitudinally into two moieties, the nature of such easements varying with the particular circumstances in each case.[1]

Jones v *Pritchard*

An interesting illustration of a party-wall being divided longitudinally into moieties and of the various cross easements which may arise in such an event occurs in the recent case of *Jones* v. *Pritchard*.[2]

The plaintiff and defendant owned adjoining houses divided by a party-wall. The plaintiff's house had been built first as a detached residence with the party-wall forming its western wall and having on the western side thereof fireplaces and flues useless for the purposes of the plaintiff's house but capable of being used for any adjoining house that might thereafter at any time be erected on the western side. The defendant being desirous of erecting such a house and of using the fireplaces and flues for the purposes thereof when erected, he and the owner of the plaintiff's house entered into an agreement for the sale to the defendant of the western half of the western wall of the plaintiff's house, such wall being treated as divided from top to bottom throughout by a vertical plane in the centre thereof, it being the intention of the parties to the agreement that the wall should thereafter be a party-wall, owned not in undivided, but in divided, moieties by the plaintiff's predecessor in title and the defendant respectively.

For the purpose of considering the mutual rights and obligations of the parties the Court treated the agreement as having been completed by an actual conveyance to the

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repair, *see supra* and Chap. VIII, Part III.

[1] *See Jones* v. *Pritchard* (1908), 1 Ch., 630; 24 Times L. R., 309.

[2] (1908) 1 Ch., 630; 24 Times L. R., 309. Another instance of a party-wall being apparently so treated occurs in *Colebeck* v. *Girdlers Co.* (1875), 1 Q. B. D., 234; 45 L. J. Q. B., 225, where the lessees of adjoining houses divided by a party-wall were each under a covenant to repair their respective premises including party-walls, but no question of cross easements arose in that case

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defendant of the western moiety of the party-wall together with the ground upon which such western moiety stood. Subsequently the defendant erected his house and utilised the fireplaces and flues for the purposes of such house, as it was intended by the agreement that he should. The flue connected with the defendant's drawing-room having become defective by reason of cracks which had developed in the surrounding masonry, smoke found its way therefrom through the plaintiff's half of the party-wall into the plaintiff's drawing-room, and apparently at times also into his dining-room, causing damage to his decorations and furniture. The plaintiff accordingly brought an action for a perpetual injunction to restrain the nuisance.

The action failed, but the case derives additional interest from being one of first impression on the question as to what is the precise nature of the easements impliedly granted or reserved upon the division of a party-wall into moieties, and the judgment of Parker, J., is instructive as elucidating the principles upon which such implication proceeds.

Mutual rights and obligations.

It may now be stated as a general proposition that if a man grant a divided moiety of an outside wall of his own house with the intention of making such wall a party-wall between such house and an adjoining house to be built by the grantee, the law will imply the grant and reservation in favour of the grantor and grantee respectively of all such easements as may be necessary to effectuate the common intention of the parties with regard to the user of the wall, the nature of such easements varying with the particular circumstances of each case.[1]

"Thus, if, for example, it is within the contemplation of the "parties that the grantee shall support the roof of the house "he intends to build upon that moiety of the wall which is "comprised in the grant, the other moiety of the wall will be "subject to an easement of lateral support for the benefit of "the roof when erected; and similarly the grantee's moiety of "the wall will pass to him subject to the easement of lateral

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[1] (1908) 1 Ch. at pp. 635, 636; 24 Times L. R. at p. 310.

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"support for the benefit of the grantor's roof if supported by "his half of the wall."[1]

So, too, in circumstances similar to those in *Jones* v. *Pritchard*,[2] there will arise by implied grant and reservation in favour of grantee and grantor respectively all such easements as are necessary to enable the grantor and grantee each to use the flues connected with fireplaces on his side of the wall.[3]

Again, either owner of a divided moiety would be entitled to execute repairs and do all such other acts on the property of the other owners as would be reasonably necessary to the continued enjoyment of the easements.[4]

So, too, in similar circumstances, neither owner would be liable to the other, if owing to natural decay or otherwise his moiety of the wall fell into such a condition that the easements to which it was subject became difficult or impossible of exercise, for apart from any special local custom or express contract each would be subject to the general rule that the owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement by the owner of the dominant tenement.[5]

Similarly, each must conform to the principle that the owner of a servient tenement cannot so deal with it as to render the easement over it incapable of being enjoyed, or more difficult of enjoyment, by the owner of the dominant tenement.[6]

Finally, it may be observed that the primary easement which was established in *Jones* v. *Pritchard*,[7] was the right of the defendant to allow smoke to pass from his fireplace

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[1] *Ibid.*, citing *Richards* v. *Rose* (1853), 9 Exch., 218; 23 L. J. Exch., 3; *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (1907), App. Cas., 476.

[2] (1908) 1 Ch., 630; 24 Times L. R., 309.

[3] (1908) 1 Ch. at p. 637; 24 Times L. R. at p. 310.

[4] (1908) 1 Ch. at p. 638; 24 Times L. R. at p. 311.

[5] (1908) 1 Ch. at p. 637; 24 Times L. R. at p. 310.

[6] *Ibid.*

[7] (1908) 1 Ch. at p. 639; 24 Times L. R., 309 (311).

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into the flue connected therewith, notwithstanding that at any point of its passage up the flue it might pass from the defendant's moiety into the plaintiff's moiety of the flue.

Subject, however, to any such implied easements the respective owners of divided moieties of party-walls are, like any other owners of servient tenements, free to deal with their respective moieties in any way they please.[1]

Mutual rights and obligations of co-owners of undivided party-wall.

Where a party-wall is the subject of a tenancy in common, according to the first meaning assigned to it in *Watson* v. *Gray*,[2] an ouster from the use of the wall by either tenant in common of the other will sustain an action for trespass by the latter.[3]

In special Acts requiring, or relating to, the construction of party walls, there is, in the absence of express provision, no presumption that a wall which is a party-wall (as belonging to two persons as part owners) up to part of its height is a party-wall for the whole of its height, for a wall may be a party-wall up to a certain height, and above that height be the separate property of one of the owners.[4]

In carrying out building operations, each part-owner is bound to see that reasonable precautions are taken to protect the wall from injury, and is under the same liability for damage caused to the wall through the negligence of his contractor, as in other cases.[5]

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[1] (1908) 1 Ch. at p. 636; 24 Times L. R. at p. 310.

[2] (1880) 14 Ch. D., 192 (194).

[3] *Stedman* v. *Smith* (1857), 8 E. & B., 1; 26 L. J. Q. B., 314; *Watson* v. *Gray*, *ubi sup.* Such as the destruction of the wall without rebuilding, or with rebuilding involving a loss of identity (*Stedman* v. *Smith*, *ubi sup.*), or the placing of an obstruction on it (*Watson* v. *Gray*, *ubi sup.*; *Kanakayya* v. *Narasimhula* (1896), I. L. R., 19 Mad., 38). But either tenant in common may repair the party-wall, or pull it down and rebuild it with no material alteration without being a trespasser, *Colebeck* v. *Girdlers Co.* (1875), 1 Q. B. D., 234; 45 L. J. Q. B., 225; *Standard Bank of British S. America* v. *Stokes* (1878), 9 Ch. D., 68; *Cubitt* v. *Potter* (1829), 8 B. & C. 257; *Stedman* v. *Smith*, *ubi sup.*

[4] *Weston* v. *Arnold* (1873), L. R. 8 Ch. App., 1084; *Drury* v. *A. & N. Aux. Co.-op. Soc.* (1896), 2 Q. B., 271.

[5] *Hughes* v. *Percival* (1883), 8 App. Cas., 443, and *see supra*, Part IV, C.

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CHAPTER IV.

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Miscellaneous Easements and Miscellaneous Rights not amounting to Easements.

It is proposed to devote this chapter to an examination of those two classes of rights which, by reason of not falling within the four well-known classes of easements which formed the subject of the last chapter, may be described respectively as "Miscellaneous Easements," or "Rights in the nature of Easements," and as "Miscellaneous Rights not amounting to Easements."

In the former category it is intended to deal with those easements which are of the character of nuisances, and those miscellaneous easements which are not of the character of nuisances, and comprise easements arising by custom such as rights of privacy and of other kinds, and the no less important easements of fishery and pasturage.

In the latter category will be discussed rights in gross,

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such as public and private rights of way and profits à prendre in gross, rights of prospect and other rights which, though partaking of the nature of easements, do not amount to easements in contemplation of law.

Part I.—Miscellaneous Easements, or Rights in the nature of Easements.

A.—Easements of the character of nuisances.

The comfortable and wholesome enjoyment of property requires that neighbours should mutually abstain from committing injurious, noxious, or offensive acts, or carrying on injurious or offensive trades, or occupations, on their respective premises.

In certain circumstances, and under certain conditions, the disregard of this necessary canon of property becomes in the eye of the law a nuisance,[1] for which relief may be granted by injunction or damages, or both.

Acquired by prescription.

But nuisances may be protected, or, as has been quaintly said, "hallowed"[2] by prescription.

Time from which prescription begins to run.

The exercise of a noxious, injurious, or offensive act, trade, or occupation for a period of twenty years will create a prescriptive right to the continuance of the nuisance.[3]

The period of prescription will begin to run, not necessarily from the time that the particular act, trade, or occupation commenced, but from the time that the nuisance first became perceptible as an actionable wrong to the party complaining.[4]

And this rule proceeds on the principle that user which

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[1] As instances of such a nuisance, *see* Indian Easements Act, s. 7, ills. (*b*), (*c*), and (*f*), App. VII.

[2] *Per* Vaughan, J., in *Bliss* v. *Hall* (1838), 5 Scott, 500; 4 Bing. N. C., 183.

[3] *Elliotson* v. *Feetham* (1835), 2 Bing. N. C., 134; 2 Scott, 174; *Bliss* v. *Hall*, *ubi sup.*; *Tipping* v. *St. Helen's Smelting Co.* (1863), 4 B. & S., 608; *Crump* v. *Lambert* (1867), L. R., 3 Eq., 413; *Earl of Harrington* v. *Derby Corporation* (1905), 1 Ch. at p. 219.

[4] *Flight* v. *Thomas* (1839), 10 A. & E., 590; *Murgatroyd* v. *Robinson* (1857), 7 E. & B., 391; *Goldsmith* v. *Tonbridge Wells Improvement Commissioners* (1866), L. R., 1 Ch. App., 349; *Sturges* v. *Bridgman* (1879), 11 Ch. D., 852.

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is secret and, therefore, incapable of interruption creates no prescriptive right.[1]

From this rule it follows that a man has no right to complain of a nuisance which has not matured into an easement until he is prejudicially affected by it.[2] Mere prospect of injury is not in general sufficient.[3]

It is only in respect of private nuisances that prescriptive rights can be acquired.

No easement in case of public nuisance.

No easement arises where the nuisance is a common or public nuisance.[4]

Weld v. *Hornby*.

In *Weld* v. *Hornby*,[5] Lord Ellenborough observes: "And "however twenty years' acquiescence may bind parties whose "private rights only are affected, yet the public have an "interest in the suppression of public nuisances, though of "longer standing."

Rex v. *Cross*.

And in *Rex* v. *Cross*,[6] the same judge says: "And is there "any doubt that if coaches, on the occasion of a rout, wait "an unreasonable length of time in a public street, and "obstruct the transit of His Majesty's subjects who wish "to pass through it on carriages or on foot, the persons "who cause and permit such coaches so to wait are guilty of "a nuisance? . . . The King's highway is not to be used as a "stable-yard. It is immaterial how long the practice may have "prevailed, for no length of time will legitimate a nuisance."[7]

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[1] *Sturges* v. *Bridgman*, *ubi sup.*

[2] *See* cases mentioned in note 4 on last page, and Kerr on Injunctions, 4th Ed., at p. 123.

[3] Kerr on Injunctions, *ubi sup.*; and *see Att.-Genl.* v. *Council of Borough of Birmingham* (1858), 4 K. & J., 528. But the Court may, by virtue of its jurisdiction to restrain acts which, when completed, result in a ground of action, interfere before any actual nuisance has been committed, when it is satisfied that the act complained of will inevitably result in a nuisance, *see* Kerr on Injunctions, *ubi sup.* and *Att.-Genl.* v. *Corporation of Manchester* (1893), 2 Ch., 87; *Att.-Genl.* v. *Corporation of Nottingham* (1904), 1 Ch., 673; *Bindu Bashini Chowdhrani* v. *Jahnabi Chowdhrani* (1896), I. L. R., 24 Cal., 260; *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee* (1904), I. L. R., 31 Cal., 944; *Gangabai* v. *Purshotam Atmaram* (1908), I. L. R., 32 Bom., 146.

[4] *Weld* v. *Hornby* (1806), 7 East., 195; *Rex* v. *Cross* (1812), 3 Camp., 225; *Att.-Genl.* v. *Corporation of Barnsley* (1874), 9 W. N., 37; *Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R., 499.

[5] (1806) 7 East, at p. 199.

[6] (1812) 3 Camp. at p. 226.

[7] *I.e.* a public nuisance.

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Mention may be made of the following easements of the character of nuisances:—

(1) Easements to pollute or taint air.[1]

(2) Easements to pollute or taint water.[2]

(3) Easements of noise or vibration.[3]

Elements of, and nature of relief for, actionable nuisance.

It may be useful at this stage to state briefly the principles by which the Courts are guided in judging what constitutes an actionable nuisance—that is, a nuisance unfortified by easement, and in granting relief therefor.[4]

These principles may be conveniently grouped under the respective headings of (1) Interference with comfort, (2) Injury to health, (3) Injury to property.

Grounds of relief for interference with comfort.

(1) *Interference with comfort.*—The question whether the Court will restrain a nuisance productive of nothing more than sensible personal discomfort must depend on the object and duration of the alleged nuisance and the circumstances of the locality where it occurs, and on pre-existing noises; in each case this is a question of degree and of fact.[5]

Neighbourliness and expediency require a certain degree of mutual forbearance, otherwise the business of life and the reasonable enjoyment of property would be impossible. Thus, it has been said that "the law, in judging what consti-"tutes a nuisance, does take into consideration both the "object and duration of that which is said to constitute the "nuisance."[6]

If a man lives in a town he must submit to the discomfort

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[1] *See* I. E. Act, s. 7. ill. (*b*), App. VII, and Chap. III, Part I.

[2] *See* I. E. Act, s. 7, ill. (*f*), App. VII, and Chap. III, Part III, F (1).

[3] *See Elliotson* v. *Feetham* (1835), 2 Bing. N. C., 134; 2 Scott, 174; *Soltau* v. *De Held* (1851), 2 Sim. N. S., 133; *Crump* v. *Lambert* (1867), L. R., 3 Eq., 413; *Sturges* v. *Bridgman* (1879), 11 Ch. D., 852; I. E. Act, s. 7, ill. (*c*), App. VII.

[4] *See* this subject further treated in connection with the disturbance of natural rights in general and in particular, in Chap. V.

[5] *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. C., 642; 35 L. J. Q. B., 66; and *see Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R., 499 (508); *Harrison* v. *Southwark and Vauxhall Water Co.* (1891), 2 Ch., 409; *Polsue Alfieri Ltd.* v. *Rushmer* (1907), App. Cas., 121.

[6] *Per* Vaughan Williams, J., in *Harrison* v. *Southwark and Vauxhall Water Co., ubi sup.* at p. 414.

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arising from those operations which may be carried on in his immediate locality and which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and the public at large.[1]

And he must also to a considerable extent put up with those noises which, from the character of his neighbourhood, he must reasonably expect.[2]

On the other hand, when these considerations are not present or do not apply, the Court will restrain a nuisance productive of material discomfort, whether such nuisance takes the form of smoke unaccompanied by noise or noxious vapours,[3] noise alone,[4] or of offensive vapours not injurious to health,[5] or of vibration.[6]

For injury to health.

(2) *Injury to health.*—Where there is material injury to health the Court will always restrain the continuance of a nuisance.[7]

And it is no answer that the public are benefited by the carrying on of the particular act or trade,[8] or that the person carrying it on derives no profit from it.[9]

For injury to property.

(3) *Injury to property.*—Material injury to a man's property caused by the carrying on of another's trade or occupation

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[1] *St. Helen's Smelting Co.* v. *Tipping*, *ubi sup.*; and *see Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali*, *ubi sup.* at p. 509.

[2] *Ball* v. *Ray* (1873), L. R., 8 Ch. App., 467, 471. It is of course otherwise when the noises are unusual and cause material discomfort, *Ibid.*

[3] *Crump* v. *Lambert* (1867), L. R., 3 Eq., 409; *Salvin* v. *North Brancepeth Coal Co.* (1874), L. R., 9 Ch. App., 705; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., p. 54.

[4] *Elliotson* v. *Feetham*, *ubi sup.*; *Soltau* v. *De Held*, *ubi sup.*; *Crump* v. *Lambert*, *ubi sup.*; *Broder* v. *Saillard* (1876), 2 Ch. D., 692; *Land Mortgage Bank of India* v. *Ahmedbhoy*, *ubi sup.*

[5] *Walter* v. *Selfe* (1851), 4 De G. & S., 315; 20 L. J. Ch., 433; *Crump* v. *Lambert*, *ubi sup.*

[6] *Colwell* v. *St. Pancras Borough Council* (1904), 1 Ch., 707.

[7] *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C., 300; *Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1866), L. R., 1 Ch. App., 349; *Att.-Genl.* v. *Mayor of Basingstoke* (1876), 45 L. J. Ch., 728, and *see Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), *ubi sup.*

[8] *Stockport Waterworks Co.* v. *Potter*, *ubi sup.*; and *see Att.-Genl.* v. *Council of Borough of Birmingham* (1858), 4 K. & J., 528.

[9] *Att.-Genl.* v. *Mayor of Basingstoke*, *ubi sup.*

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gives rise to a very different consideration from that which arises in the case of mere personal discomfort. The submission required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of property.[1]

Where there is material injury to property the Court will always grant relief.[2]

Specific Relief Act and Civil Procedure Code. Nature of relief.

In India, the nature of the relief to be granted for an actionable nuisance is governed by the provisions of the Specific Relief Act[3] and the Civil Procedure Code.[4]

The principles upon which those provisions rest are drawn from English sources,[5] and may be shortly stated as follows:—

1. The Court will not grant an injunction where the injury is merely temporary or trifling, but will do so in cases where the injury is permanent and serious.[6]

2. In determining whether the injury is serious or not, regard must be had to all the consequences that flow from it, not merely as to the comfort or convenience of the occupier, but also as to the effect of the nuisance upon the value of the estate and upon the prospect of dealing with it to advantage.[7]

3. Injury rendering property materially unsuitable for the purpose to which it is applied, or lessening considerably the enjoyment its owner derives from it, will be relieved by

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[1] *St. Helen's Smelting Co.* v. *Tipping*, *ubi sup.*; and *see Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali*, *ubi sup.*

[2] *Ibid.*, and *see Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35; *Ball* v. *Ray* (1873), L. R., 8 Ch. App., 467.

[3] Act I of 1877, ss. 52-57, App. V.

[4] Act XIV of 1882, ss. 492–497, App. X.

[5] *Land Mortgage Bank of India* v. *Ahmedbhoy*, *ubi sup.*

[6] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1866), L. R., 1 Ch. App., 349; *Lillywhite* v. *Trimmer* (1867), 36 L. J. Ch., 530; *Att.-Genl.* v. *Gee* (1870), L. R., 10 Eq., 131; *Att.-Genl.* v. *Mayor of Basingstoke* (1876), 45 L. J. Ch., 728, and *see Land Mortgage Bank of India* v. *Ahmedbhoy*, *ubi sup.*; *Colwell* v. *St. Pancras Borough Council* (1904), 1 Ch., 707.

[7] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners*; *Att.-Genl.* v. *Gee*; *Land Mortgage Bank of India* v. *Ahmedbhoy*, *ubi sup.* But *query* whether depreciation in value is in itself a ground of action, *Colwell* v. *St. Pancras Borough Council*, *ubi sup.* at p. 711.

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injunction and not by damages,[1] provided always that the nuisance is one which it is possible to remove.[2]

4. Although the mere apprehension of a nuisance is not in general a ground for the interference of the Court,[3] yet if some degree of present nuisance exists, the Court will take into account its probable continuance and increase.[4]

5. The balance of convenience must be considered where the circumstances of the case demand it. Relief by way of injunction will not be granted where the exigencies of the case are altogether disproportionate to the consequences that would result to the defendant or other persons from the granting of such relief.[5]

6. If the case be one where scientific or expert evidence is given, the Court ought mainly to rely upon the facts which are proved and not upon the conclusions drawn from scientific investigations however valuable they may be in aid, or in explanation and qualification, of the facts which are proved.[6]

7. Acquiescence[7] in the nuisance, or undue and misleading delay in bringing the action,[8] will deprive the plaintiff of his remedy.

For the Court to refuse relief on the ground of acquiescence a much stronger case requires to be made out at the hearing than on an interlocutory application.[9]

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[1] *See Land Mortgage Bank of India* v. *Ahmedbhoy*, *ubi sup.* at p. 67, and the cases there collected.

[2] *See Att.-Genl.* v. *Colney Hatch Lunatic Asylum* (1868), L. R., 4 Ch. App., pp. 154, 157.

[3] *See supra.*

[4] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners*, *ubi sup.*; *Land Mortgage Bank of India* v. *Ahmedbhoy*, *ubi sup.* at p. 66.

[5] *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. C. at p. 644; *Lillywhite* v. *Trimmer* (1867), 36 L. J. Ch., 560; *Att.-Genl.* v. *Guardians of Poor of Union of Dorking* (1881), 20 Ch. D., 595.

[6] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners*, *ubi sup.*; and *see Att.-Genl.* v. *Corporation of Nottingham* (1904), 1 Ch., 673, 678, 684.

[7] *De Bussche* v. *Alt.* (1878), 8 Ch. D., p. 314. *Ibid.*, as to what constitutes "acquiescence."

[8] *See Johnson* v. *Wyatt* (1863), 2 De G. J. & S., 18; *Hogg* v. *Scott* (1874), L. R., 18 Eq., 444; *Land Mortgage Bank of India* v. *Ahmedbhoy*, *ubi sup.* at p. 85. And *see* further on the subject of acquiescence and laches, Chap. IX, Part II, B, and Chap. XI, Part III (4) (*b*).

[9] *Johnson* v. *Wyatt*; *Hogg* v. *Scott*, *ubi sup.*; and *see Att.-Genl.* v. *Colney Hatch Lunatic Asylum* (1868), L. R., 4 Ch. App., p. 160. These cases shew that mere delay

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8. If the circumstances of the case require it, both injunction and damages may be awarded together under the Specific Relief Act.[1]

9. The injunction granted should be directed to restraining not only the particular act complained of, but also the use of the subject of the nuisance in any other manner so as to cause damage or material discomfort and annoyance to the plaintiff.[2]

10. It is in the discretion of the Court to grant an injunction where it is necessary to prevent the multiplicity of judicial proceedings,[3] and the exercise of this discretion is called for in cases where a man in order to assert his right would, unless relieved by injunction, be obliged to bring a series of actions for every additional and necessarily recurring injury or annoyance that he might sustain.[4]

General principles summarised in *Shelfer* v. *City of London Electric Lighting Co.*

The general principles upon which the Court should act in deciding whether it will grant an injunction or award damages are concisely summarised by A. L. Smith, L.J., in *Shelfer* v. *City of London Electric Lighting Co.*,[5] when he says: "In my "opinion it may be stated as a good working rule that (1) if "the injury to the plaintiff's legal rights is small, (2) and is "one which is capable of being estimated in money, (3) and "is one which can be adequately compensated by a small "money payment, (4) and the case is one in which it would "be oppressive to the defendant to grant an injunction, then "damages in substitution for an injunction may be given."

When plaintiff entitled to injunction, defendant not to be considered except under special circumstances.

It should be observed that where the party complaining has proved his right to an injunction against a nuisance, it is no part of the duty of the Court to inquire in what way the

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in bringing the action is not sufficient *per se* to defeat the right to relief. And *see* further, Chap. XI, Part III, (4) (*b*).

[1] *Land Mortgage Bank of India* v. *Ahmedbhoy*, *ubi sup.*

[2] *Fleming* v. *Hislop* (1886), 11 App. Cas., 686; and *see Walter* v. *Selfe* (1851), 20 L. J. Ch., 433; 4 De G. & S., 315; *Roskell* v. *Whitworth* (1871), 19 W. R., 805; *Goose* v. *Bedford* (1873), 21 W. R. (Eng.), 449.

[3] Specific Relief Act, s. 54 (*e*), App. V.

[4] *Att.-Genl.* v. *Council of Borough of Birmingham* (1858), 4 K. & J., 528 (546); *Grand Junction Canal Co.* v. *Shugar* (1871), L. R., 6 Ch. App., 483; *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), L. R., 8 Ch. App., 125 (142); *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35 (68).

[5] (1895) 1 Ch. at p. 322.

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party committing the nuisance can best remove it. The plaintiff is entitled to an injunction at once unless the removal of the nuisance is physically impossible, and it is for the defendant to find his way out of the difficulty irrespective of the inconvenience or expense to which he may be subjected.[1]

In special circumstances, where the difficulty of removing the nuisance is very great, the Court will suspend the operation of the injunction for a period with liberty to the defendant to apply for an extension of time.[2]

Who are liable for a nuisance.

Liability for the creation, or continuance, of a nuisance depends upon the obligation of the defendant to prevent or remove it. If there is no such obligation or duty on his part he is not liable for the nuisance.[3]

The existence of such obligation or duty makes the person continuing the nuisance as liable as the person creating it.[4]

But no liability for the continuance of a nuisance arises if there is no evidence that it was sanctioned, approved, or adopted by the defendant or that he derived benefit from it.[5]

Nor is there any liability for a nuisance the real cause of which lies in some existing state of things, on the plaintiff's land, or in something which the plaintiff has himself done on his land.[6]

Untenable pleas.

The plea that the nuisance commenced before the party complaining of it came in its way is no legal justification of the wrong.[7] Nor is the plea tenable that if a third person had done his duty the nuisance would not have arisen,[8] or that the

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[1] *Att.-Genl.* v. *Colney Hatch Lunatic Asylum* (1868), L. R., 4 Ch. App., 146.

[2] *Ibid.*; and *see Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1865), L. R., 1 Eq., 161; L. R., 1 Ch. App., 349.

[3] *Rex* v. *Pedly* (1834), 1 Ad. & E., 822; 40 R. R., 444; *Todd* v. *Flight* (1860), 9 C. B. N. S., 377; *Pretty* v. *Bickmore* (1873), L. R., 8 C. P., 401; *Greenwell* v. *Low Beechburn Coal Co.* (1897), 2 Q. B., 165; *Hall* v. *Duke of Norfolk* (1900), 2 Ch., 493.

[4] *Broder* v. *Saillard* (1876), 2 Ch. D., 692.

[5] *Saxby* v. *Manchester and Sheffield Ry. Co.* (1869), L. R., 4 C. P., 198.

[6] *Chastey* v. *Ackland* (1895), 2 Ch., 389.

[7] *Bliss* v. *Hall* (1838), 5 Scott, 500; 4 Bing. N. C., 183; *Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R. at p. 568.

[8] *Att.-Genl.* v. *Scott* (1904), 1 K. B., 404.

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nuisance gives a countervailing advantage to the injured party.[1]

If the result of the nuisance be to cause injury to health or property, the plea that the business out of which the nuisance arose is being carried on in a suitable locality is unsustainable.[2]

Duties, responsibilities, and liabilities of public bodies in relation to nuisances.

The present subject would not be complete without some reference to the rights, duties, and liabilities of public bodies, such as Municipalities and Local Boards in India, in relation to nuisances.

It occasionally happens that nuisances are created by public bodies in the sanitation, or attempted sanitation, of some particular locality, or in the performance of other municipal work, and questions commonly arise in such cases as to the duties and responsibilities of these public functionaries to the general body of ratepayers on the one side, and their liabilities to the injured party on the other.

Att.-Genl. v. *Council of Borough of Birmingham.*

In *Attorney-General* v. *Council of Borough of Birmingham*,[3] the plaintiff and relator was the owner of a large estate through which, and on either side of which, flowed a river which some miles above the plaintiff's estate joined another river. Into this latter river, at different points, the drainage of the town of Birmingham and its neighbourhood passed by means of various small sewers, and the sewage, owing to the distance which it had to travel and to its flowing through a variety of small outlets, became gradually purified by filtration before reaching the plaintiff's estate and had perceptibly no effect upon the waters of the former river which were comparatively pure and clear, were well filled with fish, and from time immemorial had been used by the proprietors of land along the river for brewing, and for agricultural and domestic purposes.

By a local Act the defendants were empowered to effectually

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[1] *Rex* v. *Ward* (1836), 4 Ad. & E., 384; *Wednesbury Corporation* v. *The Lodge Holes Colliery Co., Ltd.* (1907), 1 K. B., 78 (91).

[2] *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. C., 642; *Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R. at p. 509.

[3] (1858) 4 K. & J., 528.

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drain the town of Birmingham, and, in the professed discharge of such powers, they constructed a large main sewer through which the whole, or by far the greater portion, of the sewage of the town of Birmingham and its neighbourhood was emptied and discharged into the former river, by which means a very considerable additional area of sewage, as compared with the old system, was carried off from the town and its neighbourhood.

The result of the new system of sewage was to cause so serious a pollution of the water of the former river, that fish could no longer live there, cattle could no longer drink of the water, and sheep could no longer be washed there.

In granting relief to the plaintiff by *interim* injunction, the Court arrived at the following conclusions :—

1. That public works ordered by legislative enactment must be so executed as not to interfere with the private rights of individuals ;[1] and that in deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer unless his rights are invaded is one which the Court cannot take into consideration.[2]

2. That in such circumstances it is not the function of the Court to sit as a committee for public safety, but to interpret what powers have been given to the defendants, and to decide what the rights of private individuals are, and whether such rights have been infringed.

3. That the defendants were not justified in so carrying out the operations required of them as to produce the results complained of by the plaintiff.

4. That assuming the inhabitants of Birmingham to have possessed the right, before the passing of the Act in question, to drain their houses into the former river, such circumstance

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[1] And *see Att.-Genl.* v. *Dorking Union*, *ubi sup.* at p. 609 ; *Earl of Harrington* v. *Derby Corporation* (1905), 1 Ch. at p. 222.

[2] But *see infra*, *Att.-Genl.* v. *Dorking Union* (1882), 20 Ch. D., 595, for the circumstances under which the Court will be justified in refusing an injunction on the principle of the balance of convenience.

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would not authorise the defendants to employ a new system of drainage causing injury to the plaintiff.

In *Attorney-General* v. *Colney Hatch Lunatic Asylum*[1] it was decided that it is the duty of the Court in each case to determine what powers have been given to public bodies by the particular enactment under which they profess to act, and to see that those functions are duly administered, and that unless the act done causing the nuisance was absolutely necessary for the purpose of the object of the enactment and clearly provided for by the legislature, the public body doing such act is responsible for the injury resulting therefrom. *Att.-Gen.* v. *Colney Hatch Lunatic Asylum.*

In such a case it is no answer to an information at the relation of a Local Board of Health to abate a nuisance arising from sewage, that the Board of Health has power itself to remedy the evil by making sewers; because it is the duty of the Board to prevent a nuisance arising in its district instead of putting the ratepayers to the expense of additional works.

In *Attorney-General and Dommes* v. *The Mayor of Basingstoke*,[2] it was held that a corporation which suffered sewage to continue to run from a drain in the town into the plaintiff's canal, and thereby created a nuisance, and caused damage to the plaintiff, was liable to be restrained by injunction from continuing such nuisance and damage, and that the plea that the defendants derived no profit from the works causing the nuisance was no answer to the plaintiff's case. *Att.-Gen.* v. *Mayor of Basingstoke.*

Attorney-General v. *Guardians of Poor of Union of Dorking*[3] is an important case. *Att.-Gen.* v. *Guardians of Poor of Union of Dorking.*

The information and action were brought by the owner of a house and grounds in the parish of Dorking for the purpose of restraining the defendants, as the local authority under the Public Health Act, 1875, from causing or permitting the sewage from the town of Dorking, other than sewage so conveyed by

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[1] (1868) L. R., 4 Ch. App., 146.
[2] (1876) 45 L. J. Ch., 726.
[3] (1882) 20 Ch. D., 595.

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prescriptive right before the commencement of the action, to flow in an impurified state into the brook which bounded the plaintiff's land so as to create a nuisance.

It was alleged in the statement of claim that the sewage of the town which drained into the aforesaid brook had greatly increased by reason of the growth of the town, and was becoming more and more of a nuisance and an injury to the neighbourhood and to the plaintiff himself and his family; that the defendants were using sewers, drains, and outfalls connected with the town for the purpose of conveying sewage into the said brook without such sewage being purified or freed from foul matter; that the principal sewers were vested in the defendants, and that new buildings were continually erected in the town, and new drains from them were connected with the sewers vested in the defendants, so that the quantity of filthy sewage was continually increased; and that the persons by whom such connections were made had not acquired any prescriptive right to drain into the sewers; that the defendants had made bye-laws obliging persons building new houses to connect their drains with the sewers and forbidding them to drain into cesspools; and that the defendants had attempted to carry out a scheme for constituting a united district for dealing with sewage which had proved abortive, and were taking no other measures to remedy the nuisance and injury complained of.

The defendants denied the nuisance; they asserted that the principal sewers had been made and used for at least twenty-four years, and long before the plaintiff came to reside in his house; that the sewers were not vested in them but in the Highway Board; that they had not used or made any sewers, drains, or outfalls connected with the town of *Dorking*, and that they had no power to prevent owners of houses from making connections with the public sewers or using the sewers; and that the bye-law directing builders to make a connection with the sewers had not been, and would not be, acted upon until some proper scheme of drainage had been completed. They stated the efforts they had made and were

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making to constitute a system of drainage, and alleged that a scheme for such purpose was before the Local Government Board.

It was found that the defendants, in order to construct a new system of drainage, which is what they had to do, and what they intended to do when they could, were obliged to acquire land, and that they had endeavoured to acquire land, but had not been successful.

The Appeal Court, in affirming the order of Hall, V.C., dismissing the information and action with costs, decided as follows:—

(1) A Local Sanitary Authority in whom the sewers are vested have only a limited ownership in them.[1] This does not give them the right to stop up the sewers and thereby cause a serious nuisance to the inhabitants of the district whose drainage it is their duty to protect and perfect.[2]

(2) Such limited ownership carries with it a limited responsibility, and although, perhaps, the Local Sanitary Authority might obtain an injunction to restrain persons from using the sewers who had no right to do so, a landowner complaining of the nuisance cannot bring an action against them *for not doing so; because* an action cannot be maintained either at law or in equity to compel a person to bring an action for the purpose of restraining a nuisance which he cannot himself prevent.[3]

Misfeasance and nonfeasance.

(3) The remedy against a public body for nuisance proceeds upon the ground of misfeasance (or the active and unauthorised commission of a nuisance) as distinguished from nonfeasance (or the passive acquiescence in the continuation of a previously existing nuisance).[4]

Remedy by mandamus.

(4) If the Local Sanitary Authority are neglecting their duties in providing a sufficient sanitary scheme for the

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[1] *See* also *Earl of Harrington* v. *Derby Corporation* (1905), 1 Ch., 205 (220).

[2] *Ibid.*

[3] *See* also *Earl of Harrington* v. *Derby Corporation*, *ubi sup.*

[4] *Att.-Genl.* v. *Dorking Union*, *ubi sup.* at p. 609; *Earl of Harrington* v. *Derby Corporation*, *ubi sup.* at pp. 205, 223, 224, 225; *Maguire* v. *Liverpool Corporation* (1905), 1 K. B., 767.

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neighbourhood the remedy of the aggrieved landowner is by mandamus.

Balance of convenience.

(5) In dealing with the question of granting an injunction to restrain the continuance of an existing state of things which can otherwise only be stopped by the exercise of parliamentary powers, the Court, in exercising what is a very delicate jurisdiction, must always consider the balance of convenience.

In such a case it would not be right to grant an injunction the effect of which would be to cause a most serious injury to a town or district and its inhabitants.

Rights and duty of public body as trustees for the ratepayers.

When, conversely to the cases above considered, the general body of ratepayers becomes the injured party by reason of damage done to property vested in the Local Authority, the latter as trustee for the former of the damaged property, and of all rights and amenities incident thereto, is entitled as against the wrongdoer, and bound in its capacity as trustee, if the proper discharge of its duty to the ratepayers so requires, and in the absence of *mala fides*, to insist on the full legal remedy.[1]

Discretion of public body, how to be exercised.

And where the Legislature has invested a public body with powers for a particular purpose and has given it a discretion in the manner of exercising such powers, the Court will not interfere with such discretion so long as it is exercised *bonâ fide* and reasonably, and relates to something which is within the limits of the authority conferred.[2]

B.—Easements not of the Character of Nuisances.

These may be divided into the following classes:—

(1) *Easements arising by Custom.* (2) *Easements of Fishery in England.* (3) *Easements of Fishery in India.* (4) *Easements of Pasturage, and* (5) *Other Miscellaneous Easements.*

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[1] *Wednesbury Corporation* v. *Lodge Holes Colliery Co., Ltd.* (1907), 1 K. B., 78. This principle is not affected by the decision of the House of Lords in the same case, reversing the Court of Appeal, on the question of the measure of damages for subsidence caused to a highway by mining operations, *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corporation* (1908), App. Cas. 323, as to which, *see infra*, Part II, A (2).

[2] *Westminster Corporation* v. *London and N.-W. Ry. Co.* (1905), App. Cas., 426.

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(1) *Easements arising by Custom.*

Instances have already been given of these easements.[1] Here it will be sufficient to notice their peculiar characteristics.

Difference between custom and prescription.

The acquisition of an easement by virtue of a custom differs from the acquisition of an easement by prescription in that prescription belongs only to the individual, whereas custom must appertain to many as a class.[2]

Upon this distinction are founded the rules (*a*) that profits à prendre may be acquired by prescription by the individual but not by a class such as the inhabitants of a village or parish, or by the public, and (*b*) that a profit à prendre cannot be acquired by custom, since in the one case the prescription, and in the other case the custom, would be void for unreasonableness as tending to the entire destruction of the property.[3]

Gateward's case.

In *Gateward's case*[4] it was said, "another difference was "taken, and agreed, between a prescription which always is "alleged in the person, and a custom, which always ought to "be alleged in the law; for every prescription ought to have by "common intendment a lawful beginning, but otherwise it is

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[1] *See* Chap. I, Part I.

[2] *Abbot* v. *Weekly* (1677), 1 Lev., 176; *Mounsey* v. *Ismay* (1865), 3 H. & C., 486; 34 L. J., Exch., 52; and *see Brocklebank* v. *Thompson* (1903), 2 Ch., 344.

[3] Williams on Rights of Common (1880), 13, 194; *Gateward's case* (1607), 6 Rep. 59*b*; *Grimstead* v. *Marlowe* (1792), 4 T. R., 717; *Blewett* v. *Tregonning* (1835), 3 A. & E., 554; *Bland* v. *Lipscombe* (1854), 4 E. & B., 713*n*.; *Race* v. *Ward* (1858), 4 E. & B., p. 705; *Lord Rivers* v. *Adams* (1878), 3 Exch. D., 361; 48 L. J. Exch., 47; *Luchmeeput Singh* v. *Sadaulla Nushyo* (1882), I. L. R., 9 Cal., 698; *Tilbury* v. *Silva* (1890), 45 Ch. D., 98; *Lord Fitzhardinge* v. *Purcell* (1908), 2 Ch., 139; *Lord Chesterfield* v. *Harris* (1908), 2 Ch., 397 (408) (411) (412). In *Goodman* v. *Mayor of Saltash* (1882), 7 App. Cas., 633, where two of the free inhabitants of ancient tenements in the Borough of Saltash claimed against the Corporation a right of dredging for oysters and the usage was shewn to have existed as of right and without interruption in such a manner as would support a claim by prescription, the rule laid down in *Gateward's case* was got over by presuming a legal origin to have arisen out of a supposed grant to the Corporation in trust for the free inhabitants of ancient tenements within the Borough. In India, though profits à prendre are easements under the Indian Limitation and Indian Easements Acts, and s. 18 of the latter Act expressly provides for the acquisition of easements by virtue of a local custom, it seems that the acquisition of a *profit à prendre* by custom would be defeasible on the ground of unreasonableness, *see Luchmeeput Singh* v. *Sadaulla Nashyo*, *ubi sup.* and *infra*.

[4] *Ubi sup.*

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"of a custom; for that ought to be reasonable, *ex certâ causâ* "*rationabili* (as Littleton saith) *usitata*, but need not be intended "to have a lawful beginning."[1]

Custom must be reasonable and certain.

Thus, the custom by virtue of which an easement is claimed must be reasonable and certain, otherwise no easement will be acquired.[2]

Hilton v. *Earl of Granville.*

Thus, in *Hilton* v. *Earl of Granville*,[3] it was determined that a custom to work mines and minerals in such a manner as to destroy the surface which had been granted out to another without making compensation for the injury and damage done, is not a reasonable custom.

So, too, a custom to dig for coal at pleasure, and to lay the coal on any part of the land near coal pits at any time of year, and to let it lie there as long as is pleased is a bad custom as being uncertain and unreasonable.[4]

And in Bengal it has been held that a custom claimed by the inhabitants of a village to fish in the *bhil* of a private owner is void for unreasonableness on the ground that user of the alleged right by a fluctuating and possibly unlimited number of persons would tend to the destruction of the profits.[5]

But the inhabitants of a village may establish a customary right to fish in a particular way, or within a particular distance, in public waters to the exclusion of the public.[6]

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[1] Thus an easement which is not a customary right need not be reasonable, *Radha Mandal* v. *Maliat Mandal* (1903), I. L. R., 30 Cal., 1077. But query whether this is an accurate proposition as applied to prescriptive easements. Prescription to be good must be *reasonable* in its nature and certain, Comyns' Digest, "Prescription," E, 3 and 4; *Bailey* v. *Stephens* (1862), 12 C. B. N. S. at p. 115; *Lord Chesterfield* v. *Harris* (1908), 2 Ch., 410, 412; *see* further, Chap. VII, Part I, B.

[2] *Gateward's case* (1607), *ubi sup.*; *Broadbent* v. *Wilks* (1742), Willes, 360; *Arlett* v. *Ellis* (1827), 7 B. & C., 365; *Hilton* v. *Earl of Granville* (1844), 7 Q. B., 701; *Hall* v. *Nottingham* (1875), 1 Exch. D., 1; *Bell* v. *Love* (1883), 10 Q. B. D., p. 561; *Luchmeeput Singh* v. *Sadaulla Nashyo*, *ubi sup.*; *Gokal Prasad* v. *Radho* (1888), I. L. R., 10 All., 358; *Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87; *Mohidin* v. *Shirlingappa* (1899), I. L. R., 23 Bom., 666. A custom excluding all the rights of property would *ipso facto* be bad, *Dyce* v. *Lady James Hay* (1852), 1 Macq., Sc. App., 305.

[3] (1344) 7 Q. B., 701.

[4] *Broadbent* v. *Wilks* (1742), Willes, 360.

[5] *Luchmeeput Singh* v. *Sadaulla Nashyo* (1882), I. L. R., 9 Cal., 698.

[6] *Viresa* v. *Tatayya* (1885), I. L. R., 8 Mad., 467 (472); *Narasayya* v. *Sami* (1889), I. L. R., 12 Mad., 43.

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And there may be a custom in favour of a riparian owner to irrigate his lands from a natural river flowing past them by constructing dams therein, provided such custom is proved to be ancient, continuous, peaceable, reasonable, certain, compulsory, and consistent with other customs relating to the right of irrigation from the same river.[1]

A custom which allows on certain land a lawful and innocent recreation at any time in the year,[2] and a custom of going on certain land for the purpose of religious observances,[3] or of burying dead[4] are good customs.

Proof of affirmative customary easement.

In order to establish a local custom by virtue of which the residents, or any section of them, of a particular district, city, village, or place claim to be entitled to the exercise of an affirmative easement, proof must be given of similar acts of user repeated, open, and uninterrupted.[5]

Custom cannot override the Legislature.

A custom, however otherwise valid, cannot be allowed to override the provisions of the Legislature. If the latter come into conflict with the former, the former must give way; as where a custom is alleged against the acquisition of a right by adverse possession under the Indian Limitation Act.[6]

Customary easements, as they are called in section 18 of the Indian Easements Act, should be distinguished from the customary rights referred to in section 2, clause (*b*), of the same Act.[7] The latter are rights arising by custom, but unappurtenant to a dominant tenement.[8] No fixed period of enjoyment is necessary to establish these rights,[9] but the custom must be reasonable and certain.

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[1] *Eshan Chandra Samanta* v. *Nilmoni Singh* (1908), I. L. R., 35 Cal., 851.

[2] *Hall* v. *Nottingham* (1875), 1 Exch. D., 1.

[3] *Ashraf Ali* v. *Jaga Nath* (1884), I. L. R., 6 All., 497; and *see Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87.

[4] *Mohidin* v. *Shielingappa* (1899), I. L. R., 23 Bom., 666.

[5] *Kuar Sen* v. *Mamman*; *Mohidin* v. *Shielingappa*.

[6] *Mohanlal* v. *Amratlal* (1878), I. L. R., 3 Bom., 172.

[7] *Palaniandi Tevar* v. *Pathirangonda Nadan* (1897), I. L. R., 20 Mad., 16. And *see* App. VII.

[8] *Ibid.* For instances of customary rights as distinct from customary easements, *see Ibid.*; and *Mohidin* v. *Shielingappa* (1899), I. L. R., 23 Bom., 666.

[9] *Ibid.*; and *see Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87; *Mohidin* v. *Shielingappa*, *ubi sup.*

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Easements arising by custom may be conveniently classified as follows :—

(*a*) Right of pasturage, (*b*) right of privacy, (*c*) rights of sport and recreation, (*d*) rights connected with religious observances.

(*a*) *Right of pasturage.*

Right of pasturage.

Apart from the right of grazing cattle on a neighbour's land contemplated by section 4, clause (*d*) of the Indian Easements Act, which is that of an ordinary easement,[1] there is also a right of pasturage which may arise by local custom.[2]

Secretary of State for India v. *Mathurabai.*

In *The Secretary of State for India* v. *Mathurabai*,[3] it was held that the objection, good in English law as against individuals, to a right of pasture being acquired by custom was not applicable to villages in the Bombay Presidency as against the Government, and that the right of free pasturage had always been recognised by Government as a right belonging to certain villages, and acquirable by custom or prescription.

(*b*) *Right of privacy.*

Right of privacy.

In India, this right has been generally recognised as an easement which may be acquired in virtue of a local custom.[4]

Character of the easement.

In that it prevents an adjoining owner from building on his own land so as substantially to interfere with his neighbour's privacy it is a negative easement,[5] it is also a continuous and a non-apparent easement.[6]

In India, as Dr. Whitley Stokes points out in his Anglo-Indian Codes,[7] the right of privacy founded as it is on the

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[1] App. VII, and *see infra* under "Easement of Pasturage."

[2] *See* illustration (*a*) to s. 18 of I. E. Act, App. VII.

[3] (1889), I. L. R., 14 Bom., 213.

[4] And in the Bengal Presidency by prescription, *see infra*. In England, it appears, there can be no right of privacy except by covenant, *see* Chap. I, Part I; *Komathi* v. *Gurunada Pillai* (1866), 3 Mad. H. C., 141, a case which followed the English law; *Gokhal Prasad* v. *Radho* (1888), I. L. R., 10 All., 358.

[5] *See* Chap. I, Part I.

[6] *Ibid.*, and I. E. Act, s. 5, and ill. (*d*) to same section, App. VII.

[7] Vol. 2, p. 881.

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oriental custom of secluding females, is of great importance. This, no doubt, was the reason of its introduction into the Indian Easements Act.[1]

It has been recognised also in the continental systems of jurisprudence founded on the Civil Law.[2]

The acquisition of the right as an easement has been affirmed by the High Courts of Calcutta, Bombay, and the North-Western Provinces, both independently of, and under, the Indian Easements Act.

Law in Bengal.

In the Presidency of Bengal, the views expressed by the Calcutta High Court are against an inherent right to privacy in property, but favour the acquisition of a right of privacy by prescription, grant, or express local usage.[3]

Law in Bombay.

In Bombay the right of privacy has been allowed in accordance with the usage prevailing in Guzerat, and the invasion of such privacy has been treated as an actionable wrong.[4]

Law in Madras.

In Madras the reported case law on the subject is limited to decisions that there is no natural right of privacy.[5] Though

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[1] *See* s. 18, ill. (*b*), which provides for the acquisition of an easement of privacy in virtue of a local custom.

[2] *See Komathi* v. *Gurunada Pillai* (1866), 3 Mad. H. C., 141; *Mahomed Abdur Rahim* v. *Birju Sahu* (1870), 5 B. L. R., 676.

[3] *Mahomed Abdur Rahim* v. *Birju Sahu* (1870), 5 B. L. R., 676; *Shaikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (1871), 6 B. L. R., App., 76; *Kalee Pershad Shaha* v. *Ram Pershad Shaha* (1872), 18 W. R., 14; and *see Sri Narina Chowdhry* v. *Jodoo Nath Chowdhry* (1900), 5 Cal. W. N., 147. In view of its negative character there would appear to be the same theoretical objection to the acquisition of a right of privacy by implied grant or prescription as in the case of other negative easements, but, in practice, the term "prescriptive" is applicable to the easement in the same sense as it may be applied both to affirmative and other negative easements as rights acquired, in the one case, by active user, and, in the other, by passive user or occupation, *see* Chap. I, Part I, and Chap. III, Parts I and IV.

[4] *Manishankar Hargovan* v. *Trikam Narsi* (1867), 5 Bom. H. C. (A. C. J.), 42; *Kuvarji* v. *Bai Javer* (1869), 6 Bom. H. C. (A. C. J.), 143; *Keshav* v. *Ganpat* (1871), 8 Bom. H. C. (A. C. J.), 87; *Shrinivas* v. *Reid* (1872), 9 Bom. H. C. (A. C. J.), 266; *Mangaldas* v. *Jewaran* (1899), I. L. R., 23 Bom. (675).

[5] *Komathi* v. *Gurunada Pillai* (1866), 3 Mad. H. C., 141; *Sayyad Azaf* v. *Ameerabibi* (1894), I. L. R., 18 Mad., 160. The same view prevails in other Presidencies for the reason that to treat privacy as a natural right would be to place formidable restrictions on the growth and development of urban property, *see Mahomed Abdur Rahini* v. *Birju Sahu* (1870), 5 B. L. R., 676; *Shrinivas* v. *Reid*, *ubi sup.*

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in that Presidency the right of privacy could no doubt be acquired in virtue of a custom under the Indian Easements Act,[1] it is doubtful whether, having regard to the observations of the judges in the cases above-cited,[2] the Courts would sanction the acquisition of the rights by prescription.

Law in N.-W. Provinces.

In the North-Western Provinces[3] a right of privacy has been recognised when established by custom.[4]

Gokal Prasad v. *Radho*.

In *Gokal Prasad* v. *Radho*,[5] in which all the Indian authorities were reviewed, it was decided that the question whether an easement of privacy has or has not been acquired must depend on the reasonableness or unreasonableness of the custom alleged, and that the conditions of English domestic life as regards privacy being essentially different from those of native domestic life in India, the fact that there is no such custom as the custom of privacy known in England has no bearing on the question whether there can be such a custom in India.

Each case in which such a right is in dispute must be decided upon its own facts, the primary question in all cases being, whether the privacy in fact and substantially exists and has been in fact enjoyed.[6]

If that question be answered in the negative no further question arises.

If in the affirmative, the next question is whether the privacy has been substantially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking relief against those acts.[7]

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[1] *See* s. 18, ill. (*b*), App. VII.

[2] *Kornathi* v. *Gurunada Pillai*; *Sayyad Azaf* v. *Ameerabibi*, *ubi sup.*

[3] Now called the United Provinces.

[4] *Gokal Prasad* v. *Radho* (1888), I. L. R., 10 All., 358; *Abdul Rahman* v. *Exile* (1893), I. L. R., 16 All., 69; *Kuar Sen* v. *Mamman* (1895), I. L. R., 18 All., 97; *Abdul Rahman* v. *Bhugwan Das* (1907), I. L. R., 29 All., 582.

[5] *Ubi sup.*

[6] *Ibid.*; *Abdul Rahman* v. *Bhugwan Das*, *ubi sup.*

[7] *Ibid.* What is not originally a substantial interference may become so by the defendant enabling himself to invade the plaintiff's privacy without being seen, as where the defendant had constructed a second story on a roof overlooking the plaintiff's zenana and had opened a door and windows in the new structure, *Abdul Rahman* v. *Bhugwan Das*, *ubi sup.*

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Where no easement of privacy exists the person complaining of invasion of privacy has no other remedy but to screen himself from observation by building on his own land or otherwise.[1]

Remedy for invasion of privacy where no easement exists.

An action for the disturbance of a right of privacy is maintainable not only by the owner, but also by the lessee, or other person lawfully in occupation, of the premises in respect of which the right has been acquired.[2]

Action for disturbance of right of privacy, by whom maintainable.

(c) *Rights of sport and recreation.*

There are many rights of this kind which, though not strictly speaking easements, yet in the manner of their enjoyment, may be said to assume the character of easements.

Rights of sport and recreation.

For example, a custom may be lawfully set up by the inhabitants of a place to hold lawful sports and games on a village green or other piece of land at all times of the year,[3] or to enjoy any innocent or lawful recreation,[4] or to hold horse-races upon another's land.[5]

In such cases there is no necessity to allege the custom at seasonable times.[6]

(d) *Rights connected with religious observances.*

In oriental countries the acquisition of rights relating to the performance of religious ceremonies or funeral obsequies

Rights connected with religious observances.

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[1] *Mahomed Abdur Rahim* v. *Birju Saha* (1870), 5 B. L. R., 676; *Sheikh Golam Ali* v. *Kazi Mahomed* (1870), 6 B. L. R., App., 76; *Kalee Pershad Shaha* v. *Ram Pershad Shaha* (1872), 18 W. R., 14; *Komathi* v. *Gurunada Pillai* (1866), 3 Mad. H. C., 141; *Sayyad Azuf* v. *Ameerabibi* (1894), I. L. R., 18 Mad., 163; *Tapling* v. *Jones* (1865), 11 H. L., p. 305. But even if there be no right of privacy proof of ill will or malice on the part of the defendant may deprive him of his costs, *Kalee Pershad Shaha* v. *Ram Pershad Shaha* (1872), 18 W. R., 72.

[2] I. E. Act, ss. 4 and 32, App. VII; *Kundan* v. *Bidhi Chand* (1907), I. L. R., 29 All., 64. As to the general law, *see* Gale on Easements, 8th Ed., 581; Goddard on Easements, 6th Ed., 434, 441.

[3] *Abbot* v. *Weekly* (1677), 1 Lev., 176; *Fitch* v. *Rawling*, 2 A. Bl., 393.

[4] *Hall* v. *Nottingham* (1875), 1 Exch. D., 1.

[5] *Mounsey* v. *Ismay* (1865), 3 H. & C., 486; 34 L. J. Exch., 52.

[6] *Abbot* v. *Weekly*; *Fitch* v. *Rawling*; *Mounsey* v. *Ismay*; *Hall* v. *Nottingham*, *ubi sup.*

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may obviously be a matter of great importance to the native communities.

It is apparently in this view that the Courts have favoured the acquisition of such rights as customary easements.

The right of Hindus to celebrate the *Holi* festival, or of Mahomedans to celebrate the *Mohurrum*, on another's land has been regarded as a right partaking of the character of an easement and capable of acquisition by virtue of a custom.[1]

And the right claimed by a certain section of the Mahomedans of burying their dead in a particular locality has been regarded in the same light.[2]

(2) *Rights of Fishery in England.*

(*a*) *Private rights.*

In alieno solo, are profits à prendre.

In England a private right of fishery *in alieno solo* is a profit à prendre.[3]

Private rights of fishery in England may be divided into two classes[4] —

(*a*) Common of piscary.

(*b*) Several or free fishery.

Common of piscary.

Common of piscary is the liberty of fishing in another man's water in common with the owner of the soil, and perhaps also with others who may have the same right.[5] It must be distinguished from a "common fishery," which is a public fishery, *i.e.* a fishery open to the public.[6]

The right is not one of frequent occurrence. It can be acquired either by grant or prescription, and it may be either

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[1] *Ashraf Ali* v. *Jaga Nath* (1884), I. L. R., 6 All., 697; *Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87. *See* also *Sufroo Shaikh Durjee* v. *Futteh Shaikh Durjee* (1871), 15 W. R., 505.

[2] *Mohun Lall* v. *Sheikh Noor Ahmud* (1869), 1 All. H. C., 116; and *see* *Mohidin* v. *Shirlingappa* (1899), I. L. R., 23 Bom., 666, in which a customary right to the same effect as distinct from an easement was established.

[3] *Wickham* v. *Hacker* (1840), 7 M. & W., 63; *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom. at p. 51.

[4] *Malcolmson* v. *O'Dea* (1863), 10 H. L., 593 (619).

[5] Williams on Rights of Common (1880), p. 259; and *see* *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom. at p. 46.

[6] *See* the case last cited, at p. 44.

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a right appurtenant, or a right in gross not attached to any tenement.[1]

It is governed by the same rules as rights of pasture, turbary, and estover,[2] and other profits à prendre.[3]

Thus, if claimed by prescription, as a right appurtenant, it must be limited by the wants of the estate in respect of which it is claimed.[4] It cannot be claimed as a right to enter and take without stint commercially for the purposes of sale.[5]

Several or free fishery.

Several or free fishery is an exclusive right to fish in a given place, and may exist either with or without the property in the soil,[6] and it may be acquired either by grant or prescription.[7] It may also be confined to certain fish.[8]

It *primâ facie* imports ownership in the soil,[9] but it may exist apart therefrom and be appurtenant to a manor,[10] or be a right in gross.[11]

Rights of opposite riparian owners in private waters.

With regard to what may be called "private waters," *i.e.* other than those rivers that are tidal and navigable, the soil of one-half of the river or stream *usque ad medium filum aquæ* is by law presumed to belong to the owners of the banks of the river on each side, each owner being entitled to the one-half next his side.[12] And each owner is entitled in common with the other owner to fish in the river or stream.[13]

Several fishery exercisable in public as well as private waters.

A private right of fishery is not necessarily confined to private waters, but may also be lawfully exercised in public

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[1] *Ibid.*

[2] *See infra*, Part I, B (4).

[3] *Lord Chesterfield* v. *Harris* (1908), 2 Ch., 397 (C. A.).

[4] *Ibid.* Possibly as a right in gross it may be exercised without stint, *Ibid.*, at p. 421.

[5] *Ibid.*

[6] *Holford* v. *Bailey* (1849), 13 Q. B., 445, 446; *Malcolmson* v. *O'Dea*, *ubi sup.*; and *see Baban Mayacha* v. *Nagu Shraeucha*, *ubi sup.* at p. 46.

[7] *Hudson* v. *Macrae* (1863), 4 B. & S., 585.

[8] *Rogers* v. *Allen* (1808), 1 Camp. at p. 312.

[9] *Marshall* v. *Ulleswater Steam Navigation Co.* (1862), 3 B. & S., 732. When associated with the ownership of the soil it is sometimes called a "territorial fishery," *see Baban Mayacha* v. *Nagu Shraeucha*, *ubi sup.* at p. 46.

[10] *Rogers* v. *Allen*, *ubi sup.*; *Duke of Somerset* v. *Fogwell* (1826), 5 B. & C., 875.

[11] *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. N. S., 687; 34 L. J. C. P., 309.

[12] Williams, *ubi sup.* at p. 269; and *see Bickett* v. *Morris* (1866). L. R., 1 H. L., Sc., 47.

[13] *Ibid.*

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waters, *i.e.* tidal navigable[1] rivers, for though, as will be seen, the soil of such rivers is *primâ facie* in the Crown, and the right of fishery *primâ facie* in the public,[2] in ancient times, before the passing of Magna Charta, the Crown might lawfully have exercised the right to exclude the public from fishing in such rivers, and to create a several fishery therein, and the fishery so created might, down to the end of the reign of Henry II, have lawfully become the subject of a grant from the Crown.[3]

So, too, in modern times, if proof be given of long enjoyment as of right of a several fishery in a tidal navigable river, and there is nothing to shew a modern origin, the presumption will arise that the right was created according to law and must have existed before legal memory.[4]

(*b*) *Public rights.*

Nature of.

Public rights of fishery are not easements, but belong *communis juris* to all the subjects of the Crown.[5]

Rights of Crown and public in public waters.

The soil of all tidal navigable rivers, so far as the tide flows and reflows, is *primâ facie* vested in the Crown for the benefit of the public to whom *primâ facie* belongs the right of fishing therein.[6] But where the foreshore of a tidal navigable river belongs to a private owner the public have only such rights over it, when not covered by the tide, as are ancillary to their rights of fishing and navigation in the sea.[7]

The public have also the right of fishing in the sea.[8]

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[1] The word "navigable" used in a legal sense as applied to a river in which the soil *primâ facie* belongs to the Crown, and the fishing to the public, imports that the river is one in which the tide ebbs and flows, *Murphy* v. *Ryan* (1868), Ir. R., 2 C. L., 143; 16 W. R. (Eng.), 678.

[2] *See infra* under (*b*) Public Rights.

[3] Williams, *ubi sup.*, pp. 267, 268; *Malcolmson* v. *O'Dea*, *ubi sup.* at p. 618; and *see Baban Mayacha* v. *Nagu Shravcha* (1876), I. L. R., 2 Bom., 19, 34, 35.

[4] *Malcolmson* v. *O'Dea*, *ubi sup.*

[5] *See Baban Mayacha* v. *Nagu Shravcha* (1876), I. L. R., 2 Bom. at p. 43; and *Hori Das Mal* v. *Mahomed Jaki* (1885), I. L. R., 11 Cal. at p. 442; and the English authorities there referred to.

[6] Williams, *ubi sup.*, pp. 267, 268; *Malcolmson* v. *O'Dea* (1863), 10 H. L., 593 (619); *Whitstaple Fishers* v. *Gann*, (1865), 11 H. L., 192; 20 C. B. N. S., 1.

[7] *Lord Fitzhardinge* v. *Purcell* (1908), 2 Ch., 139.

[8] Williams, *ubi up* pp. 265, 266, 268.

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To the right of fishing in the sea is added the right of fishing on the foreshore, the soil of which is ordinarily and *primâ facie* vested in the Crown for the benefit of the public.[1] Public right of fishery on foreshore.

When covered by the tide the foreshore of a tidal navigable river which belongs to a private owner is part of the sea, and the public have over it rights of fishing and navigation and rights ancillary thereto.[2]

But the public neither have, nor can by long enjoyment or otherwise acquire, a legal right to fish in private waters.[3] No public right to fish in private waters.

(3) *Easements and other Rights of Fishery in India.*

(a) *Private rights of fishery in private waters.*

In India, as in England, a several fishery may undoubtedly exist as an easement.[4]

In India, private rights of fishery, or *jalkar*, as they are termed in Bengal, are rights of great importance to the village communities, and, in many cases, are of great antiquity. Nature of.

Prior to the Indian Limitation Act, XI of 1871, these rights were treated as rights to be exercised on the soil of another, and as incorporeal hereditaments not necessarily importing any rights in the soil.[5]

Under that Act, for the purposes of limitation only, rights

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[1] Williams, *ubi sup.*, pp. 265, 266.

[2] *Lord Fitzhardinge* v. *Purcell*, *ubi sup.*

[3] *Hudson* v. *Macrae* (1863), 4 B. & S., 585; *Murphy* v. *Ryan* (1868), Ir. R., 2 C. L., 143; 16 W. R. (Eng.), 678; *Pegree* v. *Scotcher* (1882), 9 Q. B. D., 162; 46 L. T., 342; 46 J. P., 242; *Smith* v. *Andrews* (1891), 2 Ch., 678; 65 L. T., 175; Williams, *ubi sup.*, p. 268. "Private waters" would include all waters not being tidal navigable rivers. Thus the public are excluded from fishing in a non-tidal river even though it be navigable, or in a tidal navigable river above the point where the tide ebbs and flows, *Smith* v. *Andrews*, *Murphy* v. *Ryan*, *ubi sup.*

[4] *See Holford* v. *Bailey* (1849), 13 Q. B., 444, 445; *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom. at p. 46. But a several fishery in the absence of evidence as to its origin will probably be presumed to arise by virtue of ownership of the land rather than as an easement, *Ibid.* For the definition of "several fishery," *see supra*.

[5] *Baroda Kant Roy* v. *Chandra Kumar Roy* (1868), 2 B. L. R., P. C., 1; *Forbes* v. *Meer Mahomed Hossein* (1873), 12 B. L. R., P. C., 210; *Fada Jhala* v. *Gour Mohun Jhala* (1892), I. L. R., 19 Cal., 562.

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of fishery were not treated as easements but as interests in immoveable property.[1]

Are easements under Act XV of 1877.

With the passing of the Indian Limitation Act, XV of 1877, and the introduction of the interpretation clause as to easements in section 3, came a change in the law, and it was held that rights of fishery *in alieno solo* must be regarded as profits à prendre, and hence easements within the meaning of section 3 of the Act, and easements not only for the purpose of limitation, but also in regard to their nature and mode of acquisition.[2]

And like other easements, a private right of fishery, when it is an easement, does not give the grantee any interest in the soil.[3]

Profits à prendre in gross also within the Act.

Further, it has been held in Bengal that profits à prendre in gross are also within the Indian Limitation Act, XV of 1877.[4]

Meaning of *jalkar*.

The term *jalkar* appears to include not only the right of fishery but other purely aqueous rights, such as the gathering of rushes and other vegetation growing in water.[5]

"Private waters."

"Private waters" may be said to consist of *bhils*, *jheels*, or small streams, or non-navigable and non-tidal rivers, or rivers in which, though navigable, the tide does not ebb and flow.[6]

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[1] *Parbutty Nath Roy Chowdhry* v. *Madho Parve* (1878), I. L. R., 3 Cal., 276; *Fada Jhala* v. *Gour Mohun Jhala*, *ubi sup.*

[2] *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 C. L. R., 269; *Luchmeeput Singh* v. *Sadaulla Nushyo* (1882), I. L. R., 9 Cal., 703; 12 C. L. R., 382; *Fada Jhala* v. *Gour Mohun Jhala*, *ubi sup.*; and *see Dukhi Mullah* v. *Halway* (1895), I. L. R., 23 Cal., 55; and Chap. VII, Part II.

[3] *Mahananda Chakravarti* v. *Mongala-Keotani* (1904), I. L. R., 31 Cal., 937.

[4] *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 C. L. R., 269.

[5] *Radha Mohun Mundul* v. *Neel Madhub Mundul* (1875), 24 W. R., 200.

[6] *See Khoorconamoye Chowdhrain* v. *Joy Sunker Chowdhry* (1864), W. R., 267; *Chunder Jaleah* v. *Ramchurn Mookerjee* (1871), 15 W. R., 215; *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom. at p. 41. As to the legal meaning of "navigable" as differentiating public from private rivers, *see supra*, *Murphy* v. *Ryan* (1868), Ir. R., 2 C. L., 143; 16 W. R. (Eng.), 678. "Private waters" are also defined by s. 2 of the Bengal Private Fisheries Protection Act (Ben. Act II of 1889) as waters (*a*) which are the exclusive property of any person; or (*b*) in which any person has an exclusive right of fishery and in which fish are not confined but have means of egress or ingress.

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Rights of opposite riparian owners.

In India the same presumption of ownership of the soil of private rivers or streams obtains as in England,[1] and the public are equally precluded from fishing in such waters.[2]

In India, also, the presumption of a divided ownership of the soil would import a similar presumption as to the fishing rights of opposite riparian owners.[3]

Acquisition of *jalkar* not affected by interruption in the exercise of the inchoate right through lack of water.

When private rights of fishery are acquired, as they usually are, in *bhils*, *jheels*, or small streams liable to disappearance and reappearance in the dry weather and rainy season, the question arises as to whether such fluctuations would have any effect on the acquisition of the easement; that is to say, whether any interruption caused by such fluctuations in the exercise of the inchoate right would be fatal to the acquisition of the easement.

Although in the case of *jalkar* this question has not been judicially decided, a parallel is to be found in the case of a right of way by boats, which is possible of exercise only during the rainy season.

In such cases it has been held that an interruption in the actual *exercise* of the growing right through lack of sufficient rain-water would not of itself prevent the acquisition of the easement, and that unless the right were interfered with whenever there was occasion to use it, the enjoyment must be taken to be continuous and sufficient to establish it.[4] Unless this were so, no easement, the exercise of which was naturally limited to a particular period of the year, could ever be gained as a prescriptive right.[5]

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[1] *Hunooman Dass* v. *Shama Churn Bhatta* (1862), 1 Hay., 426; *Bhageeruthee Dabee* v. *Grish Chunder Chowdry* (1863), 2 Hay., 541; *Kali Kissen Tagore* v. *Jadoo Lall Mullick* (1879), 5 C. L. R. (P. C.), 97; L. R., 6 Ind. App., 190; Williams, *ubi sup.*, p. 269.

[2] *See Chunder Jaleah* v. *Ramchurn Mookerjee* (1871), 15 W. R., 215; *Babaji Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 1 Bom. at p. 41.

[3] *Forbes* v. *Meer Mahomed Hossein* (1873), 12 B. L. R., P. C. at p. 216.

[4] *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1881), I. L. R., 7 Cal., 132; 8 C. L. R., 281. And *see Ram Soonder Barooie* v. *Wooma Kant Chuckerbutty* (1864), 1 W. R., 217; *Oomar Shah* v. *Ramzan Ali* (1868), 10 W. R., 363; *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory* (1874), 22 W. R., 302; *Sheikh Mahomed Ansur* v. *Sheikh Seefatoollah* (1874), 22 W. R., 340; *Budhu Mandal* v. *Maliut Mandal* (1903), I. L. R., 30 Cal., 1077.

[5] *Ibid.*

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Private rights of fishery or *jalkar* may be either easements or rights in gross according as they are or are not appurtenant to a dominant tenement.[1]

Measure of the prescriptive right.

When *jalkar* are acquired by prescription, the extent of the prescriptive right is to be measured by its accustomed user.[2]

Disturbance of.

Jalkar, in common with other exclusive profits à prendre, but unlike easements proper, are capable of being trespassed upon,[3] and such trespass may be restrained by injunction.[4] But trespass would only lie for a wrongful encroachment on the possessor's right.[5] For any other wrongful act prejudicial to the private right an action would be maintainable for an injunction, or damages, or both, as for a nuisance.[6] If a river, subject to *jalkar*, periodically dries up, the rights do not cease, and the owner of the river bed may not so use it as to injure the rights of the *jalkar* owners when the bed re-fills.[7]

Nor can any riparian owner maintain a bund on his own land so as to intercept the passage of fish and impair the *jalkar* owner's rights, except with the latter's consent, express or implied.[8]

(b) *Private rights of fishery in public waters.*

"Public waters."

In contradistinction to private waters, "Public waters" may be defined as those waters in which the tide ebbs and flows, such as tidal navigable rivers and the sea.[9]

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[1] *Chunder Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 C. L. R., 269; and see Indian Easements Act, s. 4, ill. (*d*), App. VII.

[2] *See* Chap. VII, Part I, B.

[3] *See Babaa Mayacha* v. *Nagu Shravacha* (1876), I. L. R., 2 Bom., 45, 54. And trespass will lie for disturbing the fish though none be taken, *Ibid.* at p. 45, citing *Holford* v. *Bailey* (1849), 13 Q. B., 426; and Selwyn's Nisi Prius, Tit. (Trespass).

[4] As to the principles upon which the Court will restrain a trespass, *see* Kerr on Injunctions, 4th Ed., pp. 84, 114 *et seq.*

[5] *See Fitzgerald* v. *Firbank* (1897), 2 Ch., 96.

[6] *Ibid.*

[7] *Srikant Bhuttacharjee* v. *Kedar Nath Mookerjee* (1879), 6 Cal. L. R., 242.

[8] *RamDass Surmah* v. *Sonatun Goohoo* (1864), W. R., 275.

[9] Waters to be public must be both tidal and navigable. Thus, the public have no right of fishery in a navigable but non-tidal river, *Chunder Jaleah* v. *Ram Churn Mookerjee* (1871), 15 W. R., 215.

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It will be convenient to treat these two classes of public waters separately.

First, as to tidal navigable rivers :—

In tidal navigable rivers.

Primâ facie the soil of all such rivers is vested in the Crown, and the public have by law a right of fishing therein.[1]

Method of acquisition.

But the territorial law of England under which, so far as it rests in Magna Charta, the Crown has been precluded since the reign of Henry II from making lawful grants to private individuals in derogation of such public right, has not been introduced into and does not prevail in the Indian mofussil,[2] and it is now settled that private rights of fishery can be acquired in public rivers either by a direct grant from the Government,[3] or, if a grant or *patta* cannot be produced, by prescription from which a grant will be presumed,[4] or by custom.[5]

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[1] *Doe d. Seebkristo* v. *East India Co.* (1856), 6 Moo. I. A., 267 ; *Gureeb Hossein Chowdhry* v. *Lamb* (1859), S. D. A., 1357 ; *Bagram* v. *Collector of Bhulloa* (1864), W. R., 243 ; *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom., 19 (43) ; *Prosunno Coomar Sircar* v. *Ram Coomar Parooe* (1879), I. L. R., 4 Cal., 53 ; *Viresa* v. *Tatayya* (1885), I. L. R., 8 Mad., 467 ; *Satcowri Ghose Mondal* v. *Secretary of State for India* (1895), I. L. R., 22 Cal., 252. And *see Hori Das Mal* v. *Mahomed Jaki* (1885), I. L. R., 11 Cal., 434.

[2] *Hori Das Mal* v. *Mahomed Jaki*, *ubi sup.* at pp. 443, 444.

[3] *Gureeb Hossein Chowdhry* v. *Lamb*, *ubi sup.* ; *Baban Mayacha* v. *Nagu Shravucha*, *ubi sup.* at pp. 39, 40 ; *Hori Das Mal* v. *Mahomed Jaki*, *ubi sup.* ; *Viresa* v. *Tatayya*, *ubi sup.* ; *Satcowri Ghose Mondal* v. *Secretary of State for India*, *ubi sup.* The grant may be made by Government either in the exercise of its prerogative as the Crown or as representing the public, *Satcowri Ghose Mondal* v. *Secretary of State for India*, *ubi sup.* The Crown has the same power of making settlements of *jalkar* rights and of lands covered by water as it has of making settlements or grants for purposes of revenue of all unsettled and unappropriated lands, and no special rules of construction or evidence are to be applied in determining the nature and extent of a grant of *jalkar* in tidal navigable rivers as distinguished from those applicable to any other grant, *Hori Das Mal* v. *Mahomed Jaki*, *ubi sup.* at pp. 444, 445.

[4] *Hori Das Mal* v. *Mahomed Jaki* ; *Viresa* v. *Tatayya* ; *Satcowri Ghose Mondal* v. *Secretary of State for India*, *ubi sup.* Many of the grants of *jalkar* in tidal navigable rivers are very ancient, and although at the time when the settlements were made *pattas* were granted, the fact that such *pattas* have in most cases ceased to exist has given rise to the mode of proving such grants by secondary evidence of the grant itself, and by such evidence as can be obtained of the user and extent of the rights conveyed by it, *Hori Das Mal* v. *Mahomed Jaki*, *ubi sup.* at p. 445. The period of enjoyment must be such as will suffice for the acquisition of an easement against the Crown, *Viresa* v. *Tatayya*, *ubi sup.*

[5] *Viresa* v. *Tatayya*, *ubi sup.* at p. 472 ; *Narasayya* v. *Sami* (1889), I. L. R., 12 Mad. 43.

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Extent and mode of enjoyment.

But the private right, being contrary to the presumption in favour of the public, must be clearly established.[1]

If a public navigable river changes its course, any pre-existing exclusive right of fishery may be exercised over the new channel if within the limits of the grant,[2] or over any such pieces of water as cover its old bed provided the latter remains connected with the main channel at all seasons of the year.[3]

But when on account of a change in the course of a public navigable river what was previously an arm of such river ceases to be connected with it, any pre-existing private right of fishery therein is extinguished.[4]

The right of fishery in a river dating from the permanent settlement may be exercised in any channel of the river which is not closed at both ends and thus continues to afford a means of ingress and egress to the fish.[5]

It seems that by analogy to the provisions of Bengal Regulation XI of 1825 (alluvion and diluvion) the area over which *jalkar* is exercised may be extended by a flooding of the river by imperceptible degrees, but that a sudden irruption submerging a definite area would not have the same effect.[6]

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[1] *Gureeb Hossein Chowdhry* v. *Lamb*, *ubi sup.*; *Baban Mayacha* v. *Nagu Shrarucha*, *ubi sup.* at pp. 39, 40; *Prosunno Coomar Sircar* v. *Ram Coomar Parooe*, *ubi sup.*; *Hori Das Mal* v. *Mahomed Jaki*, *ubi sup.*

[2] *Tarini Churn Sinha* v. *Watson & Co.* (1890), I. L. R., 17 Cal., 963.

[3] *Hem Chandra Chowdhury* v. *Jaganindra Nath Ray* (1905), 8 Cal. W. N., 934. And where there is a right of fishery over a body of water connected with a public navigable river by a narrow inlet and occupying its original bed, the right is not affected either by the inlet drying up or by the possibility of its so doing, *Kalee Soondar Roy* v. *Dwarkanath Mozoomdar* (1872), 18 W. R., 460. Nor are *jalkar* rights affected by the temporary drying up of a river bed, and the owners of the bed remain liable so not to use it when dry as to injure the *jalkar* rights over it when full, *Srikant Bhuttacharjee* v. *Kedarnath Mookerjee* (1879), 6 Cal. L. R., 242. Nor is a right of fishery affected by any change in the source of the water, *Nobin Chunder Roy Chowdhry* v. *Radha Pearee Debia* (1866), 6 W. R., 176.

[4] *Ishan Chandra Dais Sarkar* v. *Upendra Nath Ghose* (1908), XII Cal. W. N., 559.

[5] *Krishnando Chowdhry* v. *Surnomoyi* (1874), 21 W. R., 27.

[6] *Sibhessury Dabee* v. *Lukhy Dabee* (1864), 1 W. R., 88.

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Private rights of fishery in public waters are protected in the same way as similar rights in private waters.[1] Disturbance of.

Secondly, as to the sea :—

If the soil of tidal rivers in India, which are arms of the sea, is *primâ facie* to be regarded as vested in the Crown,[2] so by logical sequence should the subjacent soil of the British Indian seas within the territorial limits of three geographical miles be so regarded. In the sea.

This conclusion appears now to be accepted,[3] and is in accordance with the English law.[4]

By parity of reasoning, if the territorial law of England, which since the passing of Magna Charta has debarred the Crown from making grants in derogation of the public right, is of no force in British India,[5] there seems to be no reason why private rights of fishery in the sea within territorial limits should not be capable of acquisition and protection in the same manner as private rights of fishery in tidal navigable rivers.[6] And this view has found expression in two cases before the Bombay High Court, though there has been no express decision on the subject,[7] for there appears to be no instance in which the prerogative of the Crown has been exercised to grant a private or exclusive fishery in the sea.[8]

(*c*) *Public rights of fishery.*

In India, as in England, the soil of tidal navigable rivers and of the sea within territorial limits is vested in the Crown for the benefit of its subjects,[9] who are accordingly entitled of

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[1] *See supra.*

[2] *See supra.*

[3] *Reg.* v. *Kastya Rama* (1871), 8 Bom. H. C., 67–70, 86–88, Cr. Ca.; *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom. at p. 43.

[4] *Whitstaple Fishers* v. *Gann* (1861), 11 C. B. N. S., 387 (413); 13 C. B. N. S., 853; 11 H. L., 192; 20 C. B. N. S., 1; *Malcolmson* v. *O'Dea* (1863), 10 H. L., 593.

[5] *Hori Das Mal* v. *Mahomed Jaki* (1885), I. L. R., 11 Cal., 434, 443, 444.

[6] *See supra.*

[7] *Reg.* v. *Kastya Rama*; *Baban Mayacha* v. *Nagu Shravucha*, *ubi sup.*

[8] *Ibid.*

[9] *See supra*, the authorities cited for the similar proposition as to tidal navigable rivers.

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Nature of.

common right to fish therein.[1] *Naturali vero jure communia sunt omnia hæc; aqua profluens, aer et mare.*[2] This right is, therefore, not an easement, as it cannot be prescribed for, nor is it a profit à prendre, nor is it the subject of property, but it is a natural right, like the right to air and light.[3]

User must be reasonable.

User may be regulated by custom.

Members of the public exercising the right must exercise it in a reasonable and proper manner so as not to interfere with the equal right of other members of the public.[4] And the method of exercising the right may be regulated by custom, varying in different places according to special local circumstances.[5]

Disturbance of.

Trespass will not lie for the disturbance of a common, or public, fishery, although it seems an action in trover might as to fish actually caught and taken out of the possession of the captor.[6]

And it seems clear that an action will lie for any wrongful interference with the right, for the maxim, "*Sic utere tuo ut alienum non lædas*," is as applicable to rights as it is to property.[7]

(4) *Easement of Pasturage and other Kindred Rights.*

The right of one man to pasture his cattle or sheep or goats on another's land is undoubtedly a right which can be acquired as an easement in India.[8]

How and by whom acquirable.

Where cultivators have enjoyed a right of pasturage from time immemorial over the waste lands of the villages to which they belong and of adjoining villages, a legal origin for that right will be presumed.[9]

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[1] *Reg.* v. *Kastya Rama, ubi sup.*; *Baban Mayacha* v. *Nagu Shravucha, ubi sup.* at pp. 43, 48, 51, 52.

[2] Bracton, Lib. I, cap. 12, pl. 5.

[3] *Baban Mayacha* v. *Nagu Shravucha, ubi sup.* at pp. 48, 49, 51, 52.

[4] *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom., 19.

[5] *Ibid.* at pp. 59, 60, 61.

[6] *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom. at p. 56.

[7] *Ibid.* at p. 58.

[8] *Secretary of State for India* v. *Mathurabai* (1889), I. L. R., 14 Bom., 313; *Bholanath Nundi* v. *Midnapore Zemindari Co., Ltd.* (1904), I. L. R., 31 Cal., 503; 8 Cal. W. N., 425; L. R., 31 Ind. App., 75. *See* also Indian Limitation Act, XV of 1877, s. 3, App. IV; Indian Easements Act, V of 1882, s. 4, ill. (*d*), App. VII.

[9] *Secretary of State for India* v. *Mathurabai*; *Bholanath Nundi* v. *Midnapore Zemindari Co., Ltd., ubi sup.*

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Pasture, in its widest sense, comprises all vegetable products that may be eaten, such as grass, nuts, etc., and even leaves and boughs.[1]

Pasture, what it comprises.

In England rights of pasture and other kindred rights are *profits à prendre*.[2]

Rights of pasture in England may be divided into two classes—

(*a*) Sole pasture.[3]

Sole pasture.

(*b*) Common of pasture.[4]

Common of pasture.

The right of sole pasture may be the subject of prescription.[5]

May be acquired by prescription.

The right of common of pasture is the right to pasture in common with the owner of the soil.[6]

Like the right of sole pasture it can be acquired by prescription.[7]

The other kindred rights are—

Other kindred rights.

(*a*) Common of *estovers* (French) or *botes* (Saxon), which is the right of cutting timber or underwood for fuel to be used in the house (*fire bote*), or for repairs of hedges or fences (*hedge bote*), or for repairs of house or farm buildings (*house bote*), or for repairs of agricultural implements (*plough bote*).[8]

Common of *Estovers* or *Botes*.

(*b*) Common of turbary, which is the right of cutting peat or turf.[9]

Common of turbary.

(*c*) Common of shack, a peculiar right[10] existing in certain parts of England, particularly in the county of Norfolk.[11] It is the right of individuals who occupy adjoining lands in the same common field to turn

Common of shack.

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[1] Williams on Rights of Common (1880), p. 21.

[2] *Bailey* v. *Appleyard* (1838), 8 A. & E., 161; Williams, *ubi sup.*, p. 18.

[3] Williams, *ubi sup.*, pp. 18, 28.

[4] *Ibid.*

[5] *Ibid.*, p. 18.

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*, p. 140.

[10] "Shack" is provincial English. As an intransitive verb it means "to shed or fall out as ripe grain from the ear." As a noun it means (*a*) pasture for stubble, (*b*) fallen acorns, or nuts or mast, (*c*) grain shed from the husk at harvest, (*d*) liberty of winter pasture.

[11] Williams, *ubi sup.*, p. 18.

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out their cattle or other beasts after harvest to feed promiscuously in that field.

Common of shack comprises the right to pasture in stubble, to gather fallen acorns, or nuts, or fallen mast, or grain shed from the husk at harvest, and the liberty of winter pasture.

All these kindred rights may be prescribed for,[1] but a claim to any of them, in order to be valid, must, as in all cases of a claim of right *in alieno solo*, be made with some limitation and restriction. It must be confined to some certain and definite use.[2]

(5) *Law relating to Fences and Easements connected therewith.*

Though fences may resemble party-walls in the sense of marking the line of division between lands belonging to adjoining owners, they are not, in such a case, as party-walls often are, common property,[3] but belong to *either* one or the other of the two owners.

Presumption of ownership.

To which of two adjoining owners a fence dividing their respective lands belongs is a question which is not always possible of proof, and, in the absence of clear evidence to the contrary, the presumption will arise that a fence on the edge of a ditch, or a fence on a bank with a ditch on one side of it, belongs to the owner of the land adjoining the fence or bank.[4]

When does not arise.

But if such a fence or bank has a ditch on each side of it, no such presumption of ownership arises, and the question depends on proof of acts of ownership on the part of either of the adjoining owners.[5]

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[1] Williams, *ubi sup.*, p. 68.

[2] *Clayton* v. *Corby* (1843), 5 Q. B., 415-419, 420, cited in *Lord Chesterfield* v. *Harris* (1908), 2 Ch., 397, 410, 411, 422 (C. A.).

[3] As to party-walls, *see supra*, Chap. III, Part V.

[4] *Earl of Craven* v. *Pridmore* (1902), 18 Times L. R., 282; *Henniker* v. *Howard* (1904), 90 L. T., 157. *Semble*, this presumption applies only to an artificial ditch and not to a natural watercourse, *Marshall* v. *Taylor* (1895), 1 Ch., 641; 64 L. J. Ch., 416.

[5] *Per* Bayley, J., in *Guy* v. *West*, cited in 2 Selwyn's Nisi Prius, 13th Ed., at p. 1244.

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No obligation to maintain fences at common law, but may exist by way of easement.

At common law, the owners of adjoining closes are under no obligation to fence against or for the benefit of each other, the only duty cast upon them being that they shall take care that their cattle do not trespass upon the land of others.[1]

But by prescription a landowner may be bound to maintain his fences, not only to keep his own cattle within bounds, but also for the benefit of the adjoining owners,[2] by virtue of which easement he becomes liable for any injury caused to his neighbour's cattle in consequence of his failure to repair.[3]

Effect of unity of ownership on easement.

Where adjoining lands once belonging to different persons, one of whom was bound to maintain the dividing fences, have become the property of the same person, the pre-existing obligation to repair is destroyed by the unity of ownership; and on a subsequent severance of tenements the obligation to repair will not revive except by express words in the deed of conveyance.[4]

Effect of severance.

Law as to fencing on land adjoining public road or other frequented place.

There is no general rule of law which obliges the owners or occupiers of lands abutting on a public road to keep up the fences,[5] provided the natural condition of the land is not changed.[6]

Nor is there at common law any obligation to fence mines,

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[1] *Boyle* v. *Tamlin* (1827), 6 B. & C., 329; 30 R. R., 343; *Lawrence* v. *Jenkins* (1873), L. R., 8 Q. B., 274; 42 L. J. Q. B., 147. Nor does any such obligation arise out of the relationship of landlord and tenant for the benefit of the tenant, *Erskine* v. *Adeane* (1873), L. R., 8 Ch. App., 756; 42 L. J. Ch., 835.

[2] *Ibid.* This obligation is described in Gale on Easements, 8th Ed., p. 465, as in the nature of a "spurious easement" affecting the land of the party who is bound to maintain the fences, *see Lawrence* v. *Jenkins* (1873), L. R., 8 Q. B. at p. 279, 42 L. J. Q. B. at p. 150.

[3] Gale, *ubi sup.* This liability does not extend beyond his neighbour's cattle, or such as are rightfully on the adjoining land. It does not include any other cattle, notwithstanding that they may have entered over the land of the party for whose benefit the obligation to maintain the fences exists; *ibid.*, citing *Dovaston* v. *Payne* (1795), 2 H. Bl., 527; 3 R. R. 497; Preface V; and *per* Wilmot, C.J., 3 Wilson, 126.

[4] *Per* Bayley, J., in *Boyle* v. *Tamlin*, *ubi sup.*

[5] *Potter* v. *Parry* (1859), 7 W. R. Eng., 182.

[6] *E.g.* as by mining and excavating at the side of or close to the road, *see infra*.

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quarries, or other excavations as against trespassers,[1] or at all in solitary and unfrequented places.[2]

But as between the occupier of a field and the occupier of a quarry or mine in or underlying the field, there is an implied contract on the part of the occupier of the quarry or mine to fence it in.[3]

And if the owner or occupier of land adjoining a public road makes excavations either at the side of the road or so close to it as to be dangerous to the public using the road, he must fence them in or be liable for any accident caused by his default.[4]

But there is no obligation upon the local authority to fence in an ancient open sewer adjoining a public road which was in existence when the road was dedicated.[5]

Against whom action must be brought.

An action for failure to keep a fence in repair must be brought against the occupier of the land, mine, or quarry which ought to be fenced in, and not against the owner of the fee, who is not in possession.[6]

(6) *Other Miscellaneous Easements or Rights in the nature of Easements.*

(*a*) Right to bury dead in a particular place.[7]

(*b*) Right to hold a *haut* or market on another's land.[8]

(*c*) Right to carry on a private ferry and levy tolls, in so far as it may be a right appurtenant and involves a right to embark and disembark passengers on another's land.[9]

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[1] *Williams* v. *Growcott* (1863) 32 L. J. Q. B., 237; 8 L. T., 458; *Hawken* v. *Shearer* (1887), 56 L. J. Q. B., 284.

[2] *Hawken* v. *Shearer, ubi sup.*

[3] *Williams* v. *Growcott*; *Hawken* v. *Shearer, ubi sup.*

[4] *See Binks* v. *South Yorkshire Ry. and River Dun Co.* (1862), 3 B. & S. 244; 32 L. J. Q. B., 26; *Hawken* v. *Shearer, ubi sup.*

[5] *Corgwell* v. *Metropolitan Commissioners of Sewers* (1855), 10 Exch., 771.

[6] *Cheetham* v. *Hampson* (1791), 4 Trow. Rep., 318; 2 R. R., 397; and *see Growcott* v. *Williams, ubi sup.*

[7] *Bryan* v. *Whistler* (1828), 8 B. & C., 288; 2 Man. & Ry., 318; *Mohun Lal* v. *Sheikh Noor Ahmed* (1868), 1 All. H. C., 116.

[8] *Rajah Bejoy Keshub Roy* v. *Obhoy Churn Ghose* (1871), 16 W. R., 198.

[9] *Parmeshuri Proshad Narain Singh*

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(*d*) Right to sit in a particular pew in church.[1]

(*e*) Right to hang clothes on lines passing over a neighbour's land.[2]

(*f*) Right to keep a sign-post opposite a house of entertainment.[3]

(*g*) Right to affix a sign-board to the wall of a neighbour's house.[4]

(*h*) Right to nail fruit trees or beams to a neighbour's wall.[5]

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v. *Mahomed Syud* (1881), I. L. R., 6 Cal., 603; *Nityahari Roy* v. *Dunne* (1891), I. L. R., 18 Cal., 652. A ferry is a franchise, not necessarily appurtenant to land, which can be acquired by grant or license from the Crown or ruling authority, *Huzzey* v. *Field* (1835), 2 C. M. & R., 432, 440; *Simpson* v. *Att.-Genl.* (1904), App. Cas. at p. 490; *Parmeshur Proshad Narain Singh* v. *Mahomed Syud*; *Nityahari Roy* v. *Dunne*, *ubi sup.* In England it can also be acquired by prescription, in which case a grant is presumed, *Huzzey* v. *Field*, *ubi sup.*; *Peter* v. *Kendal* (1827), 6 B. & C., 703, 780; *Trotter* v. *Harris* (1828), 2 Y. & J., 285; *Simpson* v. *Att.-Genl.*, *ubi sup.* But in Bengal, where ferries have been recognised both before and since, as well as by, the permanent settlement, the preponderating view appears to be that a ferry carrying with it an exclusive right or a monopoly cannot now be acquired by prescription under the Indian Limitation Act, XV of 1877, unless supported by additional evidence from which a grant could be implied, *see Nityahari Roy* v. *Dunne*, *ubi sup.* at pp. 660–664, referring to *Parmeshuri Proshad Singh* v. *Mahomed Syud*, *ubi sup.* But when a right of ferry is claimed as appurtenant to land, and a grant of such right by the Crown is established, neither mere subsequent non-user without waiver nor the running of an opposition ferry will destroy the right, *Nityahari Roy* v. *Dunne*, *ubi sup.* In England all ancient ferries are treated as monopolies, *see Simpson* v. *Att.-Genl.*, *ubi sup.*, but the monopoly is not the exclusive right to carry across a stream or river by any means but the exclusive right to carry across *by means of a ferry*, *Dibden* v. *Skirrow* (1907), 1 Ch., 437, affirmed by C. A. (1908), 1 Ch., 41. Thus, the building of a bridge across a river near to an ancient ferry is not a disturbance of the ferry, notwithstanding that the profits of the ferry may be diminished or altogether cease, *Dibden* v. *Skirrow*, *ubi sup.*, and *cf. Rameswar Singh* v. *Secretary of State for India* (1907), I. L. R., 34 Cal., 470, 487, 488.

[1] *Rogers* v. *Brooks* (1783), T. R., 431*n*; *Hinde* v. *Chorlton* (1866), L. R., 2 C. P., 104.

[2] *Drewell* v. *Towler* (1832), 3 B. & Ad., 735.

[3] *Hoare* v. *Metropolitan Board of Works* (1874), L. R., 9 Q. B., 296.

[4] *Moody* v. *Steggles* (1879), 12 Ch. D., 261.

[5] *Hawkins* v. *Wallis* (1763), 2 Wils., 173; *Gordhan* v. *Chota Lal* (1888), I. L. R., 13 Bom., 82. Here the wall, though a "party-wall" in the popular sense of the word as dividing two tenements or buildings, was not a party-wall in point of law (*see Watson* v. *Gray* (1880), 14 Ch. D., 192, and Chap. III, Part V, "Easements relating to Party-walls"), as it was the absolute property of one adjoining owner, subject only to an easement in the other adjoining owner, to drive nails into it. There

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(*i*) Right to retain in its position a fender or hatch for keeping a stream in a particular course.[1]

(*j*) Right to keep fixed in a river a pile of wood for the more convenient use and enjoyment of a wharf.[2]

(*k*) The right to grow rice plants in a neighbour's land to be afterwards transplanted to the dominant land.[3]

This right is strictly speaking a profit à prendre, but must be considered an easement under the Indian Limitation Act[4] and Indian Easements Act.[5]

(*l*) Right to keep a bund at a particular height.[6]

(*m*) Although the dominant owner is usually liable to repair the servient tenement for the use and preservation of his easement,[7] yet he can by prescription, express stipulation, or any special local custom, acquire a right against the servient owner that he shall repair it.[8]

(*n*) Right to have a party-wall maintained as a dividing wall between adjoining tenements.[9]

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seems no doubt that prior to the acquisition of an easement over it, the owner of the wall would have a remedy in trespass for the nailing of trees, plants, or beams to the wall, or for any other direct or immediate act of interference therewith, *see Lawrence* v. *Obee* (1815), 1 Stark., 22; *Gregory* v. *Piper* (1829), 9 B. & C., 591; *Bullen & Leake*, Prec. of Pleadings, 6th Ed., 501; or it would be open to him to abate the nuisance from his own premises if that should be possible, or, if not, by entering on the adjoining tenement after notice to the owner, *see Lemmon* v. *Webb* (1894), 3 Ch. 1; (1895), App. Cas. 1; and the other cases cited *infra*, Part II, C. (3); Gale on Easements, 8th Ed., p. 578. The abatement should be effected with reasonable care not to cause more damage than necessary, Gale, *ubi sup*. But it is doubtful whether in most cases the remedy by abatement would be well advised, *see* Chap. XI, Part II.

[1] *Wood* v. *Hewett* (1846), 8 Q. B. (917).

[2] *Lancaster* v. *Eve* (1859), 5 C. B. N. S., 717.

[3] *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397.

[4] S. 3, App. IV.

[5] S. 4, App. VII; and *see Sundrabai* v. *Jayawant*, *ubi sup*.

[6] *Narayana Reddi* v. *Venkata Chariar* (1900), I. L. R., 24 Mad., 202.

[7] *See* Chap. VIII, Part III.

[8] *See* notes to *Pomfret* v. *Rycroft* (1681), 1 Saund. 322; Wms. Notes at p. 566; *Jones* v. *Pritchard* (1908), 1 Ch. at p. 637; 24 Times L. R., 309 (310); and Chap. VIII, Part III.

[9] *Watson* v. *Gray* (1880), 14 Ch. D., 192 (195).

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(*o*) Right to carry smoke away by a pipe overhanging another's land.[1]

Part II.—Miscellaneous Rights not amounting to Easements.

Under this heading it is proposed to deal successively with (*a*) Rights in Gross; (*b*) Profits à prendre in Gross; (*c*) other Miscellaneous Rights.

A.—Rights in Gross.

How distinguishable from easements.

It will be remembered that these rights, though analogous to easements in some respects, differ from them materially in others, and chiefly in the respect of their enjoyment being altogether irrespective of the possession or ownership of land.[2] They are not, as easements are, rights appurtenant to land.[3]

Another distinctive feature is that rights in gross are in reality nothing more than licenses, and as such are incapable of assignment.[4]

Further, being altogether unconnected with the enjoyment or occupation of land, they cannot be annexed as incident to it.[5]

Nor do the principles governing the acquisition of easements by long enjoyment apply to these rights, for there must be something more than mere user to establish them; there must be something to shew their nature and origin as by production of a grant.[6]

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[1] *Jones* v. *Pritchard* (1908), 1 Ch. at p. 639; 24 Times L. R. at p. 311.

[2] *See* Chap. I, Part I.

[3] *Ackroyd* v. *Smith* (1850), 10 C. B., 164 (187); 19 L. J. C. P., 315 (319); *Bailey* v. *Stephens* (1862), 12 C. B. N. S., 91; 31 L. J. C. P., 226; *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. N. S., 687; 34 L. J. C. P., 309; *Rangeley* v. *The Midland Ry. Co.* (1868), L. R., 3 Ch. App., 306 (310); 37 L. J. Ch., 313 (316); *Thorpe* v. *Brumfitt* (1873), L. R., 8 Ch. App., 650; *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 915; 6 C. L. R., 269.

[4] *Ackroyd* v. *Smith*, *ubi sup.*; *Bailey* v. *Stephens*, *ubi sup.*; *Shuttleworth* v. *Le Fleming*, *ubi sup.*; *Thorpe* v. *Brumfitt*, *ubi sup.* at p. 655.

[5] *Ackroyd* v. *Smith*; *Bailey* v. *Stephens*; *Shuttleworth* v. *Le Fleming*, *ubi sup.*

[6] *See Bailey* v. *Stephens*, *ubi sup.*; *Shuttleworth* v. *Le Fleming*, *ubi sup.*, and the learned argument of Mr. Mellish, afterwards Lord Justice Mellish, in the case last cited, in which it was held that the English Prescription Act does not apply to rights in gross. But *see* the remarks of White, J., in *Chundee Churn*

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Any attempt to apply the prescriptive method to rights in gross would at once cause difficulties as to the evidence necessary to establish their nature and quality, which do not occur in the case of rights proved and determined by user and enjoyment on the part of the occupiers of a dominant tenement; as, for instance, whether enjoyment by one man in the course of his own life, and no more, would establish any right either in that man for life or a descendible right in gross.[1]

Excepting profits à prendre in gross, rights in gross not within Act XV of 1877. All rights in gross excluded from Indian Easements Act.

Rights in gross apart from profits à prendre in gross do not appear to be within the scope of the Indian Limitation Act, XV of 1877, and they have been expressly excluded from the Indian Easements Act, V of 1882.[2]

The two important classes of rights in gross which it is necessary to consider here are Private Rights of Way, and Public Rights of Way.

Preceding observations on rights in gross refer to private rights.

Public rights of way, as will presently be seen, are on a different footing.

(1) *Private Rights of Way.*

Private rights of way.

Private rights of way when they are not appurtenant to land are rights in gross and are subject to the same method of acquisition.[3]

(2) *Public Rights of Way.*

As already explained, a public right of way, being unconnected with a dominant tenant, is a right in gross and clearly distinguishable from an easement.[4]

Mundul v. *Shib Chunder Mundul* (1880), I. L. R., 9 Cal., 945; 6 C. L. R., 269, on the subject of profits à prendre in gross.

[1] *See Shuttleworth* v. *Le Fleming* (1865), 19 C. B. N. S. (712); 34 L. J. C. P. (312).

[2] These Acts, like the Prescription Act in England, establish the acquisition of easements by user, *see* Chap. VII, Part II.

[3] *See supra* under "Rights in Gross."

[4] *See* Chap. I, Part I; *Rangeley* v. *Midland Ry. Co.* (1868), L. R., 3 Ch. App., 306 (310); 39 L. J. Ch., 313 (316); *Hawkins* v. *Rutter* (1892), 1 Q. B., 668. It cannot be claimed as a dominant tenement to which to attach an easement, *Att.-Genl.* v. *Copeland* (1901), 2 Q. B., 101, but this does not prevent a presumption from long user by dedication or mutual agreement, or the exercise of statutory powers, of the right to discharge water from a highway on to adjoining land, S. C. on appeal (1902), 1 K. B., 690.

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It is exercised over what is called a Highway. Highway.

A highway has been described as "a passage which is open to all the King's subjects,"[1] and it can be either a public road,[2] or a public river,[3] or a railroad,[4] or the sea-shore.[5] Variety of highways.

As a public road, a highway may be termed a *foot way*, set apart solely for the purpose of foot passengers; or it may be a *pack* and *prime way*, which is a horse and foot way; or it may be a *cart* and *carriage way*; or it may include all three.[6] Highway as a public road.

In the older cases a public right of way was treated solely as the liberty of passing and repassing and the user of a highway for any other purpose was regarded as a trespass.[7] Extent of lawful user of public right of way.

But the modern tendency is not to enforce this rule too strictly, for in a recent case it was said that although highways were *primâ facie* dedicated for the purpose of passage, other things were done upon them by everybody which were permitted by the law as constituting a reasonable and usual mode of using a highway as such, and that so long as a person did not go beyond such reasonable mode of using it he was not a trespasser.[8]

"If a person is passing along a part of a highway which "belongs to a particular owner, in order to do something "beyond, on land which does not belong to that owner, then, so "far as that owner is concerned, he is merely passing along "that part of the highway, and, whatever it may be the inten- "tion to do further on, that would be no trespass as against "such owner. Again, if a man is passing along a highway, "only intending, so far as the highway is concerned, to pass

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[1] Notes to *Doraston* v. *Payne*, 2 Smith's L. C., 7th Ed., p. 164.

[2] *Hunooman Das* v. *Shamachurn Bhutta* (1862), 1 Hay., 426; notes to *Doraston* v. *Payne*, *ubi sup.* at p. 165.

[3] *Ibid.*

[4] Notes to *Doraston* v. *Payne*, *ubi sup.*; *Rex* v. *Severn and Wye Ry. Co.* (1819), 2 B. & Ald., 646.

[5] Note to *Doraston* v. *Payne*, *ubi sup.* But the sea-shore is not a highway for all purposes, *Llandudno U. C.* v. *Woods* (1899), 2 Ch., 705.

[6] Co. Lit., 56*a*; notes to *Doraston* v. *Payne*, *ubi sup.*, p. 164.

[7] *Lade* v. *Shepherd* (1725), 2 Str., 1004; *Stevens* v. *Whistler* (1809), 11 East, 51; *Reg.* v. *Pratt* (1855), 4 E. & B., 860; *St. Mary Newington* v. *Jacob* (1871), L. R., 7 Q. B., 47; Notes to *Doraston* v. *Payne*, *ubi sup.*, p. 165.

[8] *Harrison* v. *Duke of Rutland* (1893), 1 Q. B., 142; and *see Hickman* v. *Maisey* (1900), 1 Q. B., 752.

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"along it, though he intends to go from it and goes into other "land of the same owner, and does something contrary to "his rights, I do not think there will be any trespass on the "highway."[1]

But any user of a highway which interferes with the enjoyment of his property by the owner of the soil, or otherwise exceeds a reasonable and ordinary user of the highway is a clear trespass.[2]

Acquired under statute or by dedication.

Public rights of way may be created by statute[3] or may arise out of the dedication to the public use by a landowner of that portion of his property over which the rights are exercised.[4]

Dedication, how made.

Such dedication may be made by express grant, but it is usually founded on a presumption derived from user on the part of the public.[5]

Rebuttable presumption.

The presumption will be rebutted by proof of circumstances incompatible with dedication.[6]

Elements of valid dedication.

In every case there must be an *animus dedicandi*, an intention to dedicate, of which the user by the public is *evidence* and no more.[7]

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[1] *Harrison* v. *Duke of Rutland*, *ubi sup.* at p. 147, *per* Lord Esher, M.R.

[2] *Lade* v. *Shepherd* (1735), 2 Str., 1004; *Stevens* v. *Whistler* (1809), 11 East, 51; *Reg.* v. *Pratt* (1855), 4 E. & B., 860; *Harrison* v. *Duke of Rutland*, *ubi sup.*; *Luscombe* v. *G. W. Ry. Co.* (1899), 2 Q. B., 313; *Hickman* v. *Maisey* (1900), 1 Q. B., 752. The following have been held to be acts of unreasonable user amounting to a trespass: (1) Going on to a highway for the purpose of interfering with the rights of sport which the owner of the soil was exercising on another part of his land, *Harrison* v. *Duke of Rutland*, *ubi sup.*; (2) allowing cattle to stray on a highway, *Luscombe* v. *G. W. Ry. Co.*, *ubi sup.*; (3) using a highway as a place from which to watch trials of racehorses, *Hickman* v. *Maisey*, *ubi sup.*

[3] *See* notes to *Doraston* v. *Payne*, *ubi sup.* at p. 156.

[4] *Rex* v. *Lloyd* (1808), 1 Camp., 260; *Trustees of the British Museum* v. *Finnis* (1833), 5 C. & P., 460; *Grand Surrey Canal Co.* v. *Hall* (1840), 1 M. & G., 392; *Vestry of Bermondsey* v. *Brown* (1865), 35 Beav., 226, L. R., 1 Eq., 204; *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (1878), I. L. R., 7 Bom., 209; and *see Att.-Genl.* v. *Esher Linoleum Co., Ltd.* (1901), 2 Ch., 647.

[5] *Ibid.*

[6] *See* notes to *Doraston* v. *Payne*, 2 Smith's L. C., 11th Ed., 172, 173; *Corsellis* v. *London County Council* (1907), 1 Ch., 704. *See* further, *infra*, under "Elements of valid dedication."

[7] *Grand Surrey Canal Co.* v. *Hall*, *ubi sup.*; *Poole* v. *Huskisson* (1843), 11 M. & W., 827; *Vestry of Bermondsey* v. *Brown*, *ubi sup.*; *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil*, *ubi sup.*; *Ranchordas* v. *Manaklal* (1890), I. L. R., 17

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The mere acting so as to raise the supposition that a way is dedicated to the public does not of itself amount to dedication.[1]

As regards the question of intention, the duration of the public user which restricts the rights of the owner of the soil is not so important as the nature of the acts done by the owner of the soil, and of the adverse acts acquiesced in by him.[2]

Further, dedication is also a question of title; the person said to have intended to dedicate cannot dedicate more than he owns.[3]

The user from which the presumption is derived must be open, as of right and uninterrupted.[4]

An interruption will rebut the presumption.[5]

Bom., 648; *Att.-Genl.* v. *Esher Linoleum Co., Ltd.* (1901), 2 Ch., 647; *Simpson* v. *Att.-Genl.* (1904), App. Cas. at p. 493; *Att.-Genl.* v. *Antrobus* (1905), 2 Ch., 201, 204. User by the public over land belonging to a non-resident owner is less cogent evidence of dedication than where the user is necessarily brought to the owner's personal notice; and, further, the weight to be attached to user must depend somewhat upon whether the land itself is cultivated land or rough and unproductive land, *Chinnock* v. *Hartley Wintney Rural District Council* (1899), 63 J. P., 327.

[1] *Barraclough* v. *Johnson* (1838), 8 A. & E., 99; 47 R. R., 506; *Simpson* v. *Att.-Genl.*, *ubi sup.*

[2] *Reg.* v. *Chorley* (1848), 12 Q. B., 515; *North London Ry. Co.* v. *St. Mary, Islington* (1873), 21 W. R., 226; notes to *Dovaston* v. *Payne*, 2 Smith's L. C., 11th Ed., p. 171. "A single act of "interruption by the owner is of more "value than many acts of enjoyment," *per* Parke, B., in *Poole* v. *Huskisson*, *ubi sup.* at p. 830.

[3] *Att.-Genl.* v. *Antrobus*, *ubi sup.* at pp. 201, 202.

[4] *Rex* v. *Barr* (1814), 4 Camp., 16; *Reg.* v. *Petrie* (1855), 4 E. & B., 737; *Poole* v. *Huskisson*; *Vestry of Bermondsey* v. *Brown*, *ubi sup.* There must have been user of the way "openly, as of right, and "for so long a time that it must have "come to the knowledge of the owner of "the fee that the public were using it as "of right," *per* Blackburn, J., in *Greenwich Board of Works* v. *Maudslay* (1869), L. R., 5 Q. B. at p. 404, quoted with approval by Farwell, J., in *Att.-Genl.* v. *Antrobus* (1905), 2 Ch. at p. 202.

[5] *Poole* v. *Huskisson*, *ubi sup.*; *Vestry of Bermondsey* v. *Brown*, *ubi sup.* Any act of the owner or the land incompatible with the notion of dedication will constitute an interruption. Thus, if he place a bar or gate across the road, which may be opened and shut at pleasure, and even though the bar or gate be knocked down, the fact of its once having existed will for a considerable period prevent the presumption of dedication from arising, *see* notes to *Dovaston* v. *Payne*, 2 Smith's L. C., 11th Ed., pp. 172, 173, and the cases there cited. And closing the land to the public one day in the year will be sufficient to displace the presumption, *Trustees of British Museum* v. *Finnis* (1833), 5 C. & P., 460 (465).

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No special period of user is required to establish the presumption.[1]

Each case must depend upon its own special circumstances.[2]

Dedication presumable in favour of general public only.

A dedication can be presumed in favour of the general public only; there can be no dedication in favour of a portion of the public, such as the inhabitants of a parish.[3]

Upon dedication, soil of highway remains vested in owner.

Upon the dedication of a highway to the public, the soil of the highway remains vested in the dedicating owner, and he can use his property in any way he pleases not inconsistent with such dedication.[4]

As was said by Cairns, L.J., in *Rangeley* v. *The Midland Railway Co.*, "a public road or highway is a dedication "of that extent of ownership or of occupancy to the public "consistent with the freehold of the *solum* of the land "remaining in the original owner."[5]

Presumption as to ownership of soil.

Since the ownership of the soil remains in the person or persons dedicating the road, the presumption is that such ownership extends to the whole width of the road in the case of an owner whose property lies on each side of it, or to the middle of it where the land on either side of it belongs to different owners.[6]

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[1] *See Woodyer* v. *Hadden* (1813), 5 Taunt., 125 (137); notes to *Dovaston* v. *Payne*, 2 Smith's L. C., 11th Ed., p. 171; *Trustees of British Museum* v. *Finnis* (1833), 5 C. & P., 460 (465), (466, note (c)).

[2] *Ibid.*; and *see Ranchoddas* v. *Manakbai* (1890), I. L. R., 17 Bom., 648.

[3] *Poole* v. *Huskisson*, *ubi sup.*; *Vestry of Bermondsey* v. *Brown* (1865), L. R., 1 Eq., 204; *Shamsoondar Bhattacharjee* v. *Monee Ram Das* (1876), 25 W. R., 233; *Brocklebank* v. *Thompson* (1903), 2 Ch., 344. Ways such as church ways or market ways may be acquired by all the inhabitants of a parish by custom (*see* Gale on Easements, 8th Ed., 344, note (*a*); *Brocklebank* v. *Thompson*, *ubi sup.*), or by an individual parishioner as appurtenant to his house (*see* Gale, *ubi sup.*), but such ways are regarded not as public ways, but private ways (*see Brocklebank* v. *Thompson*, *ubi sup.*). If such a right of way has been acquired by the inhabitants or an inhabitant of a parish, a dedication to the public would not be presumed without cogent evidence (*see Vestry of Bermondsey* v. *Brown*, *ubi sup.*

[4] *Lade* v. *Shepherd* (1735), 2 Str., 1004; *Dovaston* v. *Payne* (1795), 2 H. Bl., 527; 2 Smith's L. C. (11th Ed.), 165, 166; *Rangeley* v. *Midland Ry. Co.* (1868), L. R., 3 Ch. App., 306; 37 L. J. Ch., 313; *St. Mary Newington* v. *Jacob* (1871), L. R., 7 Q. B., 47; *Campbell Davys* v. *Lloyd* (1901), 2 Ch. at p. 525.

[5] 37 L. J. Ch., p. 316.

[6] *Cooke* v. *Green* (1823), 11 Price, 736;

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And this presumption exists as much with regard to private ways as public ways.[1]

The presumption may be rebutted by proof of circumstances incompatible therewith.[2]

Dedication must be in perpetuity.

It is now settled, though, until recently, the question does not appear to have been expressly decided, that there cannot be dedication for a term certain or uncertain; it must be in perpetuity.[3] The effect of this rule is to preclude an owner in fee as well as a lessee or other limited owner from dedicating for a term, under any circumstances.[4] But it seems that a valid dedication in perpetuity can be made not only by an owner in fee but by a lessee with the consent or acquiescence of his lessor express or presumed.[5]

By whom can be made.

Owner in fee.

Lessee.

Corporation or Company.

A corporation or a public company may dedicate, provided the dedication is not inconsistent with the objects of the corporation or company.[6]

Dedication may be qualified.

A dedication may be qualified, or partial, or conditional, or subject to reservation, or limited to a user of the highway

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Haigh v. *West* (1893), 2 Q. B., 19 (29); *London and N.-W. Ry. Co.* v. *Westminster Corporation* (1902), 1 Ch., 269 (278). The presumption *usque ad medium filum viæ* is based upon the supposition that when the road was originally formed, the proprietors on either side each contributed a portion of his land for the purpose, *Holmes* v. *Bellingham* (1859), 7 C. B. N. S., 329 (336); *London and N.-W. Ry. Co.* v. *Westminster Corporation*, *ubi sup.* But this presumption does not apply to the subsoil of a railway so as to pass underlying minerals under a grant of the land and minerals lying on each side of and adjoining a railway, *Thompson* v. *Hickman* (1907), 1 Ch., 550.

[1] *Holmes* v. *Bellingham*; *Mobaruck Shah* v. *Toofany* (1878), I. L. R., 4 Cal., 206; *In re White's Charities* (1898), 1 Ch., 659; *London and N.-W. Ry. Co.* v. *Westminster Corporation*, *ubi sup.*

[2] *Beckett* v. *The Corporation of Leeds* (1871), 26 L. J., 375; 20 W. R., 454; and *see* notes to *Doraston* v. *Payne*, 2 Sm. L. C., 11th Ed., p. 167.

[3] *Corsellis* v. *London County Council* (1907), 1 Ch., 704, adopting dictum of Byles, J., in *Dawes* v. *Hawkins* (1860), 8 C. B. N. S., 848, 858; 29 L. J. C. P., 343, 347. This rule and the maxim, "Once a highway, always a highway," appear each to be complementary of the other.

[4] Previously, there was no question that a public way used during a tenancy could be stopped by the reversioner on coming into possession, *see* *Wood* v. *Veal* (1822), 5 B. & Ald., 454, and notes to *Doraston* v. *Payne*, *ubi sup.* at p. 172.

[5] *Rex* v. *Barr* (1814), 4 Camp., 16; *Harper* v. *Charlesworth* (1825), 4 B. & C., 574, 591; *Simpson* v. *Att.-Genl.* (1904), A. C., 476, 507.

[6] *Rex* v. *Leake* (1833), 5 B. & Ad., 469; *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D., 273; notes to *Doraston* v. *Payne*, *ubi sup.* at p. 172.

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at particular times, or for particular purposes, provided such limitations are imposed at the time of dedication.[1]

Presumption of dedication against Crown.

A dedication of lands belonging to the Crown can as well be presumed as a dedication of land belonging to a private owner, and such dedication may, and ought to, be presumed from long continued user in the absence of anything to rebut the presumption.[2]

May be created by statute.

A highway may also be created by statute.[3] It is essential to its valid creation that the provisions of the Act should be strictly followed.[4]

Extent of public right of way, how measured.

The extent and mode of enjoyment of a highway must be measured by the user as proved, or by the terms of the deed when the right is so granted, but in the absence of evidence to the contrary the public are entitled to the whole width of the way without any such restriction as may be imposed by the owner of the servient tenement in the case of a prescriptive private way.[5] In *Regina* v. *United Kingdom Electric Telegraph Co.*[6] Martin, B., laid down the proposition which was accepted by the Court on a motion for a new trial: *Regina* v. *The United Kingdom Electric Tel. Co.*

"In the case of an ordinary highway, although it may be "of a varying and unequal width, running between fences, "one on each side, the right of passage or way, *primâ facie*, "and unless there be evidence to the contrary, extends to the "whole space between the fences; and the public are entitled "to the use of the entire of it as the highway and are not "confined to the part which may be metalled or kept in "order for the more convenient use of carriages and foot "passengers."[7]

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[1] *Fisher* v. *Prowse* (1862), 2 B. & S., 770; *Mercer* v. *Woodgate* (1869), L. R., 5 Q. B., 26; notes to *Doraston* v. *Payne*, *ubi sup.* at p. 173.

[2] *Turner* v. *Walsh* (1881), L. R., 6 App. Cas., 636; *First Assistant-Collector of Nasik* v. *Shamji Dasrath Patil* (1878), I. L. R., 7 Bom., 209.

[3] *Cubitt* v. *Lady Caroline Maxse* (1873), 8 C. P., 915; *Att.-Genl.* v. *Antrobus* (1905), 2 Ch., 201.

[4] *Cubitt* v. *Lady Caroline Maxse*, *ubi sup.*; *Hanbury* v. *Jenkins* (1901), 2 Ch., 401.

[5] As to such restriction, *see* Chap. VIII, Part I, C.

[6] (1862) 31 L. J. M. C., 166.

[7] *Ibid.* at p. 167. And *see Pullin* v. *Deffel* (1891), 65 L. T., 134; *Eyre* v. *New Forest Highway Board* (1892), 8 Times L. R., 648; *Robinson* v. *The Coepen Local Board* (1893), 62 L. J. Q. B.,

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Inasmuch, therefore, as there is a public right over all or any part of a public highway, if such highway be lawfully stopped at one end[1] (*e.g.* by sessions order or Act of Parliament[2]), the right of way over the remainder is not gone,[3] and the public are not deprived of any more of their right than the order or statute expresses.[4]

Direction of a highway.

Primâ facie, a public road must lead from one public place to another public place,[5] or, in other words, there cannot, *primâ facie*, be a right for the public to go to a place where the public have no right to be.[6] Thus the general public cannot by user acquire the right to visit a public monument or other object of interest or curiosity on private property.[7]

Rights in respect of which dedication to, or trust in favour of, public will not be inferred from user.

Nor will a trust for such purpose be presumed in favour of the public against a landowner who has a clear documentary

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619; *Mappin Bros.* v. *Liberty & Co.* (1903), 1 Ch., 118; *Harvey* v. *Truro Rural Council* (1903), 2 Ch., 638; *Westminster Corporation* v. *London and N.-W. Ry. Co.* (1905), App. Cas., 426; *Offin* v. *Rochford Rural Council* (1906), 1 Ch., 342; *Wednesbury Corporation* v. *Lodge Holes Colliery Co., Ltd.* (1907), 1 K. B., 78 (91). Encroachment on such space by an adjacent landowner cannot be legalised by possession for any length of time, nor is the consent of the highway authority effectual for such purpose, *Harvey* v. *Truro Rural Council*, *ubi sup.* Where adjacent land has been laid out for the purpose, even, of private traffic along the line of a public footway, and there are no circumstances shewing an intention on the part of the owner to restrict the public to that particular line, a dedication to the public as a footway of all the surface of the new strip will be presumed, *Att.-Genl.* v. *Esher Linoleum Co., Ltd.* (1901), 2 Ch., 647. And a ditch between the road and the fence may be dedicated as part of the highway notwithstanding that it cannot be used by the public for the purposes of passage, *Chorley Corporation* v. *Nightingale* (1906), 2 K. B., 612, affirmed on appeal (1907), 2 K. B., 637.

[1] *Rex* v. *Downshire* (1836), 4 A. & E., 698 (713); *Gwyn* v. *Hardwicke* (1856), 1 H. & N., 49 (55).

[2] *Reg.* v. *Burney* (1875), 31 L. T. N. S., 828.

[3] *Rex* v. *Downshire*; *Gwyn* v. *Hardwicke*, *ubi sup.*

[4] *Reg.* v. *Burney*, *ubi sup.* But if a highway be lawfully stopped at *both* ends, it ceases to be a public way, *Bailey* v. *Jamieson* (1876), 1 C. P. D., 329.

[5] *Campbell* v. *Lang* (1853), 1 Macq., 451; *Young* v. *Cuthbertson* (1853), [1 Macq., 455, 457, cited by Farwell, J., in *Att.-Genl.* v. *Antrobus* (1905), 2 Ch. at p. 206.

[6] *Per* Holmes, L.J., in the Giants Causeway case (*Giant's Causeway Co.* v. *Att.-Genl.*, *Freeman's Journal*, Jan. 15, 1898), cited by Farwell, J., in *Att.-Genl.* v. *Antrobus*, *ubi sup.*

[7] *See* cases in last footnote and the Rock and Spindle case (*Duncan* v. *Lees* 9 M., 274, 276), cited by Farwell, J., in *Att.-Genl.* v. *Antrobus*, *ubi sup.* at p. 207.

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title.[1] For such presumptions are never made unless the state of affairs is otherwise unexplainable.[2]

Nor can the dedication of a public right of way be inferred from user for purposes of recreation, or lounging, or sauntering, and not for the purpose of reaching any definite place.[3]

And no dedication will be presumed where the public have wandered at pleasure over a vacant space of land without any defined tracks in any given direction from point to point,[4] for there is no such right known to the English law as *jus spatiandi*.[5]

Cul-de-sac may become a legal highway.

It was doubted at one time whether a way could exist as a highway which had never been a thoroughfare.[6]

But it is now settled that a road may be a highway though

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[1] *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas., 633, 647; *Att.-Genl.* v. *Antrobus*, *ubi sup.* at pp. 198, 199.

[2] *Att.-Genl.* v. *Simpson* (1901), 2 Ch., 671, 698; *Att.-Genl.* v. *Antrobus*, *ubi sup.* at p. 199. Thus in the Stonehenge case (*Att.-Genl.* v. *Antrobus*, *ubi sup.*), although it was shewn that the public had been in the habit of visiting Stonehenge from time immemorial, and it was accordingly argued that a lost grant or a lost Act of Parliament must be presumed, Farwell, J., in declining to make any such presumption in the face of the owner's absolute fee simple title, pointed out the misfortune that would arise "if "the Courts were to presume novel and "unheard of trusts or statutes from acts "of kindly courtesy, and thus drive land-"owners to close their gates in order to "preserve their property"; and after adding that the owner might well have dispensed with requests for permission, where in the absence of permission no right by grant or prescription could be acquired, adopted the celebrated language of Bowen, L.J., in *Blount* v. *Layard* (1891), 2 Ch., 691*n* (approved by Lord Macnaghten in *Simpson* v. *Att.-Genl.* (1904), App. Cas., 476, 492, 493, and relied on by Buckley, J., in *Behrens* v. *Richards* (1905), 2 Ch., 614, 619, 620), that "nothing worse can happen in a "free country than to force people to be "churlish about their rights for fear that "their indulgence may be abused, and "to drive them to prevent the enjoyment "of things which, although they are "matters of private property, naturally "give pleasure to many people besides "the owners, under the fear that their "good nature may be misunderstood."

[3] *Abercromby* v. *Fermoy Town Commissioners* (1900), 1 I. R., 302, 314, cited in *Att.-Genl.* v. *Antrobus*, *ubi sup.* at p. 207.

[4] *Eyre* v. *New Forest Highway Board* (1892), 8 Times L. R., 648; *Robinson* v. *Cowpen Local Board* (1893), 62 L. J. Q. B., 619; 63 L. J. Q. B., 235 (C.A.); *Mappin Bros.* v. *Liberty & Co., Ltd.* (1903), 1 Ch., 118; *Att.-Genl.* v. *Antrobus*, *ubi sup.* at p. 204.

[5] *Att.-Genl.* v. *Antrobus*, *ubi sup.* at pp. 198, 199. And *see International Tea Stores Co.* v. *Hobbs* (1903), 2 Ch. at p. 172.

[6] Notes to *Doeaston* v. *Payne*, 2 Smith's L. C. (11th Ed.), p. 164; *Wood* v. *Veal* (1822), 5 B. & Ald. p. 456. And *see* Pratt and Mackenzie's "Law of Highways," 15th Ed., pp. 6 *et seq.*

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it never existed as a thoroughfare,[1] and that the absence of a terminus *ad quem*, whereby the road remains a *cul-de-sac*, is not necessarily fatal to the legal existence of a highway.[2]

A *cul-de-sac* may exist as a highway under a deed of dedication executed by the landowner or upon other unmistakable evidence of his intention; but mere user by the public without more is not sufficient to convert a *cul-de-sac* into a legal highway.[3]

The further condition is indispensable that there should have been expenditure on it by the parish or local authority, either expressly permitted by the landowner, or induced by his conduct.[4]

Thus it not infrequently comes about that streets in towns which are repaired, sewered, and lighted by the public authority are *culs-de-sac*.[5]

But in the country, except in places of habitual public resort, or of special public interest, it rarely or never happens that a *cul-de-sac* becomes a legal highway.[6]

Public right of deviation.

If a public way from whatever cause becomes impassable or even incapable of commodious use by the public, the right is acquired of going on the adjacent land.[7] This is not a right which is extended to the case of a private way except where it becomes impassable owing to some obstruction placed in it by the servient owner.[8]

In the case of a public way the right of deviation appears to exist, not only when the way has become impassable by reason of something not having been done, as, for example,

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[1] *See Dovaston* v. *Payne*, *ubi sup.*, and the cases there cited. *See* also Pratt and Mackenzie's "Law of Highways," *ubi sup.*

[2] *Att.-Genl.* v. *Antrobus*, *ubi sup.* at p. 206; and *see Rex* v. *Downshire* (1836), 4 A. & E., 698 (713); *Gwyn* v. *Hardwicke* (1856), 1 H. & N., 49 (56); *Reg.* v. *Burney* (1875), 31 L. T. N.S., 828.

[3] *Ibid.*, and *see per* Romer, L.J., in *Whitehouse* v. *Hugh* (1906), 2 Ch. at p. 285.

[4] *Att.-Genl.* v. *Antrobus*, *ubi sup.* at pp. 206, 207.

[5] *See Bourke* v. *Davis* (1890), 44 Ch. D., 110, 122, cited in *Att.-Genl.* v. *Antrobus*, *ubi sup.* at p. 206.

[6] *Ibid.*, and *see Att-Genl.* v. *Antrobus*, *ubi sup.* at p. 208, citing *Eyre* v. *New Forest Highway Board* (1892), 56 J. P., 517, 518; 8 Times L. R., 648.

[7] Notes to *Dovaston* v. *Payne*, 2 Sm. L. C., 11th Ed., p. 169.

[8] *See* Chap. VIII, Part I, C.

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repairs, but when it has been rendered impassable by an obstruction placed in it.[1]

Extent of right of access to highway from adjoining land.

An owner of land which is contiguous to a public highway has the right of access to the highway from his land at any point along the line of contact, whether the soil of the highway is vested in him or not.[2]

This constitutes another point of difference between a public and a private way.[3]

Liability to repair.

In England.

In England, local bodies are by various statutes required to maintain highways lying within the limits of their authority, but apart from this statutory obligation, the liability to repair is by the common law imposed on the inhabitants of the parish immediately on the dedication of the highway to the public,[4] unless they can throw the burden on other persons *ratione tenuræ*.[5]

The liability does not arise by particular custom, but is a common law *onus* for the public benefit.[6]

In India.

The same liability does not arise in India; in the mofussil questions of repairs of highways are usually provided for by Acts regulating the maintenance of roads, as, for example, the Road-Cess Act, IX of 1880, in Bengal.

In the Presidency towns such repairs are usually provided for by Municipal Acts, such as, for example, in Calcutta, the Calcutta Municipal Act, III of 1899, sections 336 and 337.

Liability to repair not enforceable by mandatory order.

It is contrary to the practice of the Court to enforce a

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[1] Notes to *Doraston* v. *Payne*, 2 Sm. L. C., *ubi sup.* at p. 170.

[2] *Lyon* v. *Fishmongers Co.* (1876), 1 App. Cas., 662; 46 L. J. Ch., 68; *Fitz* v. *Hopson* (1880), 14 Ch. D., 553, 554; 49 L. J. Ch., 325; *Ramuz* v. *Southend Local Board* (1892), 67 L. J., 169; *Chaplin* v. *Westminster Corporation* (1901), 2 Ch., 329.

[3] *See* Chap. VIII, Part I, C.

[4] *Rex* v. *Inhabitants of Leake* (1833), 5 B. & Ad., 469; 39 R. R., 521.

[5] *Rex* v. *Sheffield* (1787), 2 Jenn. R., 106; *Rex* v. *Inhabitants of Netherthong* (1818), 2 B. & Ald., 179; *Cubitt* v. *Lady Caroline Maxse* (1873), L. R., 8 C. P., 704; *Ferrand* v. *Bingley Urban Council* (1903), 2 K. B., 445. But apart from tenure there would be no legal obligation on a private individual to continue to bear a burden, however long it may have been borne, *Steel* v. *Houghton* (1788), 1 H. Bl. at p. 60; *Simpson* v. *Att.-Genl.* (1904), App. Cas., 491.

[6] *Rex* v. *Sheffield*, *ubi sup.*

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liability to repair by a mandatory order, as the Court will not superintend works of building or of repair.[1]

Nonfeasance by public body not a ground for damages.

Nor, apart from *misfeasance*, will the mere failure to repair render a public body liable to an action for damages.[2]

Thus the transfer to a public body of the obligation to repair roads does not *per se* render it liable to an action for damages for *nonfeasance* as apart from *misfeasance*; and the question whether such liability is imposed on it must be determined by the language of the particular enactment.[3]

Position of public body when highway vested in it.

When a highway is vested in the local authority, that body becomes a trustee for the public of all rights and amenities incident to its property, and whilst its rights in the highway are not less than those of a private owner, yet as trustee it has not the absolute right of a private owner to renounce them.[4]

But whilst as a general principle this is incontrovertible, the question what is the full legal remedy to which the local authority is entitled, and on which accordingly it is bound to insist, for damage done to a highway by a wrongdoer will depend on what expenditure is necessary to make good such damage.

Thus, where while working their mine the owners let down the surface of a highway which was vested in the local authority, and that body acting *bonâ fide* and on the opinion of skilled advisers restored the highway to its former level at great cost when an equally commodious road might have been made at less cost, it was *held* that the local authority was not entitled to raise the road to its former level at whatever cost and whether it was more commodious to the public or not,[5]

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[1] *Att.-Genl.* v. *Staffordshire County Council* (1905), 1 Ch., 336 (342).

[2] *Young* v. *Davis* (1862), 2 H. & C., 197; *Cowley* v. *Newmarket Local Board* (1892), App. Cas., 345.

[3] *Maguire* v. *Corporation of Liverpool* (1905), 1 K. B., 767; and *see Earl of Harrington* v. *Derby Corporation* (1905), 1 Ch., 205.

[4] *Wednesbury Corporation* v. *The Lodge Holes Colliery Co., Ltd.* (1907), 1 K. B., 78 (C. A). This decision was reversed by the House of Lords on the main question of damages (*see infra*), but this principle remains untouched.

[5] It is obvious that such a rule might lead to a ruinous and wholly unnecessary outlay. There is no authority for it, though there is authority to shew that as between the owners of a public road and the adjacent lands the former may be entitled to restore the ancient level, *per*

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and that the true measure of damages recoverable from the mine-owners was what it would have cost to make the equally commodious road.[1]

Public rights of way extinguishable only by act of God or statute.

It appears that, except by act of God[2] and legislative enactment,[3] public rights of way cannot be extinguished.

It is a settled maxim "that once a highway always a highway," for the public cannot release their rights, and there is no extinctive presumption or prescription.[4]

Effect of diversion of the way.

Diversion of the way will not extinguish the right; it will merely alter its mode of enjoyment.[5]

Tidal and navigable rivers.

Tidal and navigable rivers are also highways on which the public have a right of navigation.[6]

If a public navigable river changes its course and retains its navigable character, the new channel becomes subject to the public right of navigation.[7]

Lord Loreburn, L.C., in *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corporation* (1908), App. Cas. at p. 326.

[1] *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corporation* (1908), App. Cas. 323, reversing decision of Court of Appeal, *see supra*.

[2] As, for example, in India an earthquake which destroys a road; and *see* notes to *Doraston* v. *Payne*, 2 Sm. L. C., 11th Ed., p. 177. But an act of God causing the diversion, and not the destruction, of the way, does not extinguish the right. *See infra*.

[3] Such as an Act acquiring a public road for any particular purpose or allowing a public road to be stopped up; and *see* notes to *Doraston* v. *Payne*, *ubi sup.*, p. 177. Extinguishment by statute need not be express. It can arise by necessary implication, *Corporation of Yarmouth* v. *Simmons* (1878), 10 Ch. D., 518; but *see Coles* v. *Miles* (1888), 57 L. J. M. C., 132.

[4] *Dawes* v. *Hawkins* (1860), 8 C. B. N. S., 858. *See* also *Cubitt* v. *Lady Caroline Maxse* (1873), L. R., 8 C. P., 704, 709, 712, 716.

[5] *See* notes to *Doraston* v. *Payne*, *ubi sup.* at p. 176. As when, through natural causes, a river changes its course, *Ibid.*; and *see infra* under "Tidal and Navigable rivers."

[6] *Hunooman Dass* v. *Shama Churn Bhutta* (1862), 1 Hay, 426. Notes to *Doraston* v. *Payne*, 2 Sm. L. C., *ubi sup.* at p. 161; Williams on Rights of Common (1880), pp. 265–268; *Fishers of Whitstaple* v. *Gann* (1865), 11 H. L., 192; 20 C. B. N. S., 1; *Simpson* v. *Att.-Genl.* (1904), App. Cas. at p. 509. And *see* cases cited in next note. A private owner cannot divert the water of a public navigable river through his own land into another public river or another part of the same public river and levy tolls on the public passing over his land through the water so diverted, *Simpson* v. *Att.-Genl. ubi sup.* But the owner of a private stream may make it navigable and keep it private, *Ibid.*

[7] *Gray* v. *Anund Mohun Moitra* (1864), W. R., 108; *Tarini Churn Sinha* v. *Watson & Co.* (1890), I. L. R., 17 Cal., 963 (967).

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Ownership of bed of such rivers.

The bed of a tidal and navigable river is vested in the Crown,[1] but such ownership cannot derogate from the public right of navigation.[2]

Right accessory to public right of navigation.

And the public may have rights of passage over the banks of a tidal and navigable river for the purposes of navigation in restriction of the ordinary rights of ownership in the land of such banks.[3]

Nuisance to highway, remedies for.

The right of abatement of a public nuisance by individuals is not regarded with favour by the law.[4]

The ordinary remedy for a public nuisance is by indictment, but a public nuisance may become a private nuisance to a person who is specially and in some particular way inconvenienced thereby, as in the case of a gate across a highway which prevents a traveller from passing and which he may therefore throw down.[5]

But there is a radical difference between public nuisances arising by commission and those arising by omission, since the latter case gives no right of action to the individual however clear and special may be the damage which he has suffered.[6]

And *à fortiori* the right to abate a nuisance to a highway ought not to apply to nuisances arising from the default of the local authority to repair.[7]

Further, the right of abatement is only ancillary to the public right upon a highway which is limited to going and

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[1] *Fishers of Whitstaple* v. *Gann*, *ubi sup.*; and *see Hori Dass Mal* v. *Mahomed Jaki* (1885), I. L. R., 11 Cal., 434.

[2] *Fishers of Whitstaple* v. *Gann*, *ubi sup.* And the Crown cannot grant a monopoly of navigation, *Simpson* v. *Att.-Genl.* (1904), App. Cas., 486, 504, 511.

[3] *Roop Lall Dass* v. *The Chairman of Municipal Committee of Dacca* (1874), 22 W. R., 279.

[4] *Campbell Davys* v. *Lloyd* (1901), 2 Ch., 518.

[5] *Ibid.* And *see* Pratt and Mackenzie's Law of Highways, 15th Ed., 116, 126. An indictment does not lie on behalf of a class or section of the public for the obstruction of a local right which does not affect the public in general. Thus, a member of a class or section of the public, who is within the custom (*i.e.* to use a particular way) may, irrespective of special damage, maintain an action for the obstruction of the local right in respect of his interest therein, and in respect, also, of the obstruction of his legal right; indeed, he has no other remedy, as in such case an indictment would not lie, *Brocklebank* v. *Thompson* (1903), 2 Ch., 344 (345).

[6] *Campbell Davys* v. *Lloyd*, *ubi sup.*

[7] *Ibid.*

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coming, and the dedicating owner may complain of any abatement which imposes a greater burden on him than this.[1]

Thus, where there was a public right of way over a river by means of a footbridge which had been allowed by the local authority to fall into a state of decay, it was held that the right to use the bridge merely as a member of the public did not entitle the defendant to enter upon the *locus in quo* and rebuild the bridge.[2]

B.—Profits à prendre in gross.

Profits à prendre in gross may be described as rights unappurtenant, or unconnected with the use and enjoyment of land whereby a person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another.

Their position with reference to the Indian Limitation Act and Indian Easements Act.

Although *rights in gross* of all kinds are altogether excluded from the Indian Easements Act,[3] *profits à prendre in gross* have been held to fall within the definition given to easements in section 3 of the Indian Limitation Act, XV of 1877.[4]

And although *profits à prendre in gross* are within the Limitation Act, *easements in gross*, as distinct from the last-mentioned rights, do not appear to find a place there.

Thus it comes about, that though on the one hand all *rights in gross* are excluded from the Indian Easements Act and can only be acquired under the conditions prescribed by the English Common Law, on the other hand, under the Indian Limitation Act, *profits à prendre in gross* can be acquired by the same process as easements proper, notwithstanding that *easements in gross*, as distinct therefrom, not

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[1] *Ibid.*

[2] *Ibid.*

[3] *See Gazette of India*, 1880, Part V, p. 476.

[4] *See* App. IV, *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 C. L. R., 269, and *supra* under "Rights of Fishery in India. Private Rights."

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being within that Act, are under the same disability as rights in gross in those parts of India to which the Indian Easements Act applies.

It has been seen that, under the Common Law, *rights in gross*, being merely personal rights in the nature of licenses, unassignable and unappurtenant, cannot be the subject of prescription like rights appurtenant.[1] And the same principles would be applicable to profits à prendre in gross.[2]

Under the Indian Limitation Act, however, user of itself, without the additional proof of grant, is sufficient to establish a *profit à prendre in gross*.[3]

Thus, whatever the reason may have been for including one branch of rights in gross in the Indian Limitation Act and excluding *all* rights in gross from the Indian Easements Act, the curious result is obtained that whilst *profits à prendre in gross* can be established by mere user, all other rights in gross must, in addition to user, be supported by actual grant.

Thus, where a man claims a right, not appurtenant to any land of his own, to take fish out of another's tank, he can, under the Indian Limitation Act, establish such right by user, but if he claims a mere right of way in gross over another's land, he cannot avail himself of the Act, but must go further than user and shew a grant.

But in the provinces to which the Indian Easements Act applies, it would not be sufficient to rely on mere user for establishment of *either* of the two rights abovementioned. The common law principle would apply, and further proof, as by production of a grant, would be required.

It has been seen that a public right of way, although a right in gross, is an exception to the above rule as being acquirable by dedication.[4]

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[1] *See supra*, Part II, A.

[2] *Ibid.*

[3] Act XV of 1877, s. 26; and *see* Chap. VII, Part II.

[4] *See supra* under "Public Rights of Way."

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C.—Other Miscellaneous Rights, not amounting to Easements.

(1) *Right of Prospect.*

Right of prospect from a house.

A right of prospect, or a right to an uninterrupted view from the windows of a house, may be the subject of actual agreement, but it is not an easement, and cannot be acquired by prescription.[1]

It is merely a matter of delight,[2] an amenity of prospect, a subject-matter which is incapable of definition.[3]

Att.-Gen. v. *Doughty.*

In *Attorney-General at the relation of Gray's Inn* v. *Doughty*,[4] Lord Hardwicke said—

"I know no general rule of common law, which warrants "that, or says, that building so as to stop another's prospect is "a nuisance. Was that the case, there could be no great "towns; and I must grant injunctions to all the new buildings "in this town; it depends, therefore, on a particular right."

In *Wells* v. *Ody*,[5] Baron Parke said: "A man can bring no "action for the loss of a look-out or a prospect."

Dalton v. *Angus.*

The decision that a right of prospect is not acquired by prescription was thought by Lord Blackburn, in *Dalton* v. *Angus*,[6] to shew that whilst, on a balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen on land very near the house, should be protected after long enjoyment, on the same ground it was held expedient that the right of prospect which would impose a burthen on a very large and indefinite area should not be allowed to be created, except by actual agreement.

Other rights of prospect.

Rights to the unobstructed view of a shop window where

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[1] *Aldred's case* (1611), 9 Rep., 57*b*; *Att.-Genl.* v. *Doughty* (1752), 2 Ves. Sen., 253; *Bagram* v. *Khettranath Karfarmah* (1869), 3 B. L. R., O. C. J., 46, 47; *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 824; *Harris* v. *De Pinna* (1886), 33 Ch. D., 238 (259), (262).

[2] *Aldred's case, ubi sup.* So, too, would be a projection created merely for the purpose of ornamentation, *Nritta Kumasi Dassee* v. *Puddomani Bewah* (1903), I. L. R., 30 Cal., 503; 7 Cal. W. N., 649.

[3] *Harris* v. *De Pinna, ubi sup.* at p. 262, *per* Bowen, L.J.

[4] (1752) 2 Ves. Sen., 453.

[5] (1836) 7 C. & P., 410 (411).

[6] (1881) 6 App. Cas. at p. 824.

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goods are displayed for sale,[1] or of a sign outside a place of refreshment or entertainment,[2] or of a place of business,[3] rest on the same footing. In such cases the Courts have refused to restrain an obstruction which is not in breach of actual agreement,[4] and the view apparently taken in an earlier decision[5] in England that a right of unobstructed view to a shop window can arise by implied covenant in favour of the grantor on a severance of tenements cannot now be supported.[6]

(2) *Right to a south breeze or free and uninterrupted current of wind.*

Right to south breeze.

A right of this nature is governed by the same principles as those applying to rights of prospect.[7]

(3) *Right to have trees overhanging a neighbour's land.*

Right to have trees overhanging a neighbour's land.

It is clearly established that this right is not an easement, and cannot be acquired by prescription though it may exist by express stipulation.[8]

In the absence of such express stipulation, the owner of the overhanging tree is bound to permit the owner of the adjoining land to lop or cut them within the limits of the

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[1] *Smith* v. *Owen* (1866), 35 L. J. Ch., 317; *Gopi Nath* v. *Munno* (1907), I. L. R., 29 All., 22.

[2] *Smith* v. *Owen*, *ubi sup.*

[3] *Butt* v. *Imperial Gas Co.* (1866), L. R., 2 Ch. App., 158; *Gopi Nath* v. *Munno*, *ubi sup.*

[4] *See* the cases above cited. Nor would there apparently be a remedy in damages except for breach of an agreement, as it seems clear that no action would lie otherwise.

[5] *Riviere* v. *Bower* (1824), Ry. & Moo., 24.

[6] As being contrary to the rule of express reservation, *see infra*, Chap. VI, Part IV, B, though, according to Mr. Goddard, it may still be argued that an implied covenant would arise in favour of the *grantee* in similar circumstances, *see* Goddard on Easements, 6th Ed., 120.

[7] *Supra*, and *see Barrow* v. *Archer* (1864), 2 Hyde, 125; *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839, and Chap. III, Part I.

[8] *Lemmon* v. *Webb* (1895), App. Cas., 1, affirming decision of Court of Appeal (1894), 3 Ch., 1; *Hari Krishna Joshi* v. *Shankhar Vithal* (1894), I. L. R., 19 Bom., 420; *Behari Lal* v. *Ghisa Lal* (1902), I. L. R., 24 All., 499; *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee* (1904), I. L. R., 31 Cal., 944; Gale on Easements, 8th Ed., 471.

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encroachment, and the former is not entitled to notice unless his land is entered for the purpose of such cutting or lopping.

Lemmon v. *Webb*.

In the recent case of *Lemmon* v. *Webb*, Lindley, L.J., states the law as follows[1]:—

"The owner of a tree has no right to prevent a person "lawfully in possession of land into or over which roots or "branches have grown from cutting away so much of them as "projects into or over his land, and the owner of the tree is not "entitled to notice unless his land is entered in order to effect "such cutting. However old the roots and branches may be, "they may be cut without notice, subject to the same con- "dition. The right of an owner or occupier of land to free it "from such obstructions is not restricted by the necessity of "giving notice so long as he confines himself and his opera- "tions to his own land, including the space vertically above "and below its surface."

And in the House of Lords, Lord Macnaghten, in the course of his address, said[2]: "I think it is clear that a man is not "bound to permit a neighbour's tree to overhang the surface "of his land, however long the space above may have been "interfered with by the growth of the tree. Nor can it, I "think, be doubted, that if he can get rid of the interference "or encroachment without committing a trespass or entering "upon the land of his neighbour he may do so whenever he "pleases, and that no notice or previous communication is "required by law. That, I think, is the good sense of the "matter; and there is certainly no authority or dictum to the "contrary."

The principles applied by the English Courts have been followed in India.

Hari Krishna Joshi v. *Shankhar Vithal*.

In *Hari Krishna Joshi* v. *Shankhar Vithal*,[3] the Bombay High Court expressed itself in complete agreement with the above statement of the law by Lindley, L.J., in *Lemmon* v. *Webb*, and decided that an encroachment by overhanging

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[1] (1894) 3 Ch. at p. 14.
(1895) A. C. at p. 7.

[2] (1894) I. L. R., 19 Bom., 420.

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branches cannot by lapse of time be brought within the definition of "Easement" in section 4, or legalised under section 15, of the Indian Easements Act, V of 1882.[1]

In *Behari Lal* v. *Ghisa Lal*[2] the Allahabad High Court held that neither the lapse of time nor the religious scruples of neighbours can affect the right to cut overhanging branches. *Behari Lal* v. *Ghisa Lal.*

And in *Lakshimi Narain Banerjee* v. *Tara Prosanna Banerjee*[3] the Calcutta High Court regarded the principles laid down in *Lemmon* v. *Webb* and *Hari Krishna Joshi* v. *Shankhar Vithal* as settled beyond dispute. *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee.*

In view of the above authorities, an earlier decision of the Bombay High Court,[4] which treats an encroachment by overhanging branches as capable of developing into a prescriptive right, cannot now be accepted as good law.

Unneighbourly conduct. *Lemmon* v. *Webb.*

But though a man may himself abate the nuisance of encroaching branches or roots, he should, of course, be careful not to exercise his rights in an unneighbourly manner. For, as Lord Herschell, L.C., says in *Lemmon* v. *Webb*,[5] "it may be, "and probably is, generally a very unneighbourly act to cut "down the branches of overhanging trees unless they are "really doing some substantial harm."[6]

No analogy between projecting buildings and overhanging branches or intruding roots. *Lemmon* v. *Webb.*

It is a matter of interest to note that the Court of Appeal, in *Lemmon* v. *Webb*, considered that, as regards the question of right, there was no analogy between an encroachment by projecting buildings and an encroachment by intruding roots or overhanging branches, since the owner of a tree which gradually grows over his neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow, by reason of the secret

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[1] *See* App. VII. S. 15 corresponds with s. 26 of the Indian Limitation Act, XV of 1877.

[2] (1902) I. L. R., 24 All., 499.

[3] (1904) I. L. R., 31 Cal., 944.

[4] *Naik Parsotam Ghela* v. *Gandrap Fatehlal Gokuldas* (1892), I. L. R., 17 Bom., 745.

[5] (1895) A. C. at p. 4.

[6] And the Court is apt to take unneighbourly conduct into account when dealing with costs, *see Lemmon* v. *Webb* in the Court of Appeal, *ubi sup.*, pp. 15, 18, 24, 25.

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and unavoidable growth of the new wood and the flexibility and constant motion of the branches.[1]

Relief by injunction or damages.

The injured party may, as an alternative to abatement by his own act, seek the assistance of the Court by mandatory or perpetual injunction, or both, as the case may require.

Lakshmi Narain Banerjee v. *Tara Prosanna Banerjee*.

In *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee*[2] the plaintiff's building and wall had been injured, and were likely to be further injured, by the overhanging branches and projecting roots of the defendant's trees, and the Calcutta High Court allowed the mandatory injunction for the removal of the trees granted by the Lower Court,[3] but discharged the perpetual injunction restraining the defendant from allowing the roots of his trees to penetrate the foundations of the plaintiff's building, as being, from the nature of things, obviously unworkable.

And where damage has been actually caused by the overhanging boughs, relief may be had in damages.[4]

(4) *Rights to have roots of trees penetrating neighbour's soil.*

A similar rule prevails in a case of this kind as in the case of overhanging branches.[5]

(5) *Jus spatiandi—Jus manendi.*

The right of wandering about (*jus spatiandi*) and the right of tarrying or loitering on another's property (*jus manendi*)

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[1] (1894) 3 Ch. at p. 12. *See* the same argument in *Hari Krishna Joshi* v. *Shankhar Vithal*, *ubi sup*.

[2] *Ubi sup.*

[3] It should be noted that the injunction was directed to the removal of the *trees*, and not merely of the branches and roots, as it was considered that the nuisance could not in the circumstances effectually be abated by any less order.

[4] *Smith* v. *Giddy* (1904), 2 K. B., 448.

[5] *Norris* v. *Baker* (1613), 1 Rol. Rep., 394; *Lemmon* v. *Webb* (1894), 3 Ch., 1; (1895) App. Cas., 1; *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee* (1904), I. L. R., 31 Cal., 944.

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are not easements, and are incapable of acquisition by grant or prescription.[1]

(6) *Kumki right of landholders in South Canara.*

This right is not an easement but is merely a right exercised over Government waste by permission of the Government.[2]

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[1] *International Tea Stores Co.* v. *Hobbs* (1903), 2 Ch. at p. 172; *Att.-Genl.* v. *Antrobus* (1905), 2 Ch., 188 (198), (206).

[2] *Nagappa* v. *Subba* (1892), I. L. R., 16 Mad., 304.

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Part I.—Natural Rights Generally.

It is desired to supplement the observations already made on the character of natural rights in general,[1] and to refer briefly to the leading principles which govern their actionable disturbance.

Definition of natural rights.

It will be remembered that natural rights are regarded by law as incident to the ownership of land and as inherent in land *ex jure naturæ*, of natural right, that they are rights *in rem* enforceable against all the world, and that whereas easements are *acquired restrictions* of the complete rights of property, natural rights are themselves part of the complete rights of property, and exist wherever land the subject of ownership exists, subject only to curtailment by easement.[2]

As easements cannot exist apart from a dominant tenement, neither can natural rights from the land in which they are inherent.[3]

Suspension of natural rights.

It will be remembered also that on the creation of an easement adverse to the natural right the latter is not extinguished but suspended merely during the continuance of the easement, and revives upon the extinction of the easement.[4]

Application of the maxim, "*Sic utere tuo ut alienum non lædas.*"

It is a fundamental maxim that every landowner should so use and enjoy the natural rights of ownership as not to cause damage to his neighbour,[5] and this is a duty incidental to the possession of land.[6] "*Sic utere tuo ut alienum non lædas.*"

Natural use of land.

But the duty enjoined by the maxim is not absolute, for a user which is natural is not actionable if it be not negligent.[7]

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[1] *See* Chap. I, Part I.

[2] *Ibid.*

[3] *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C., 300.

[4] *Ibid.*

[5] *Tenant* v. *Goldwin* (1705), 2 Ld. Raym. (1092); *Fletcher* v. *Rylands* (1866), L. R., 1 Exch., 265; *Rylands* v. *Fletcher* (1868), L. R., 3 H. L., 330; *Hodgkinson* v. *Ennor* (1863), 4 B. & S., 229; *Humphries* v. *Cousins* (1877), L. R., 2 C. P. D., 239; *Madras Ry. Co.* v. *Zemindar of Carvatenagaram* (1874), 1 Ind. App., 364.

[6] *Humphries* v. *Cousins*, *ubi sup.*

[7] *Smith* v. *Kenrick* (1849), 7 C. B., 515; *Fletcher* v. *Rylands*; *Rylands* v. *Fletcher*, *ubi sup.*; *Harrison* v. *Southwark and Vauxhall Water Co.* (1891), 2 Ch., 413, 414. *See* also *supra*, Chap. III, Part IV, C.

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And if the user be lawful, the motive for the user is immaterial.[1]

Non-natural use of land.

In truth, the maxim is not applied to restrict a reasonable and natural user if not negligent, but to afford relief to adjoining landowners from the mischievous or harmful consequences of a negligent, unreasonable, or non-natural user, unless the mischief or the damage is assignable to the default of the person damaged, or, perhaps, was the result of *vis major*, or the act of God.[2]

Fletcher v. *Rylands.*

The application of the maxim is well demonstrated by Mr. Justice Blackburn in his judgment in *Fletcher* v. *Rylands* in the Court of Exchequer Chamber.[3] He says—

"We think that the true rule of law is, that the person "who, for his own purposes, brings on his lands and collects "and keeps there anything likely to do mischief if it escapes, "must keep it in at his peril, and, if he does not do so, is "*primâ facie* answerable for all the damage which is the "natural consequence of its escape. He can excuse himself "by shewing that the escape was owing to the plaintiff's "default; or, perhaps, that the escape was the consequence "of *vis major*, or the act of God. . . . The general rule, "as above stated, seems on principle just. The person "whose grass or corn is eaten down by the escaping cattle "of his neighbour, or whose mine is flooded by the water "from his neighbour's reservoir, or whose cellar is invaded "by the filth of his neighbour's privy, or whose habitation is "made unhealthy by the fumes and noisome vapours of his "neighbour's alkali works, is damnified without any fault of "his own, and it seems but reasonable and just that the "neighbour who has brought something on his own property "which was not naturally there, harmless to others so long as

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[1] *Bradford Corporation* v. *Pickles* (1895), App. Cas., 587; *The Salt Union, Ltd.* v. *Brunner Mond & Co.* (1906), 2 K. B., 822.

[2] *Baird* v. *Williamson* (1863), 15 C. B. N. S., 376; *Fletcher* v. *Rylands* (1866), L. R., 1 Exch., 265 (279); *Rylands* v. *Fletcher*, *ubi sup.*; *Nichols* v. *Marsland* (1875), L. R., 10 Exch., 255. And see *National Telephone Co.* v. *Baker* (1893), 2 Ch., 186; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Companies* (1902), App. Cas., 381.

[3] L. R., 1 Exch. at p. 279.

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"it is confined to his own property, but which he knows will "be mischievous if it gets on his neighbour's, should be "obliged to make good the damage which ensues if he does "not succeed in confining it to his own property. But for his "act in bringing it there no mischief could have accrued, and "it seems but just that he should at his peril keep it there so "that no mischief may accrue, or answer for the anticipated "consequence. And upon authority, this we think is estab- "lished to be the law, whether the things so brought be beasts, "or water, or filth, or stenches."

In *Fletcher* v. *Rylands*, the defendants, for their own purposes, brought and accumulated on their land, in a reservoir, a large quantity of water which they were under no private or public obligation to keep there, in which no rights had been acquired by other persons, and which they could have removed if they thought fit.

The water found its way out of the reservoir into some old shafts over which the reservoir had been constructed and thence into the plaintiff's mine. This was considered a non-natural use of the defendant's land, and they were accordingly held liable in damages for the injury caused to the plaintiff.[1]

Scientific discoveries and appliances are apt to swell the catalogue of non-natural user. For example, the storage and discharge of electricity may, under certain conditions, fall within the principle of *Rylands* v. *Fletcher*.[2]

Non-natural user, when not actionable.

But the exercise of statutory powers without negligence will excuse that which would otherwise be actionable on the ground of non-natural user.[3]

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[1] *See* the judgment of Blackburn, J., in *Fletcher* v. *Rylands* (1866), L. R., 1 Exch. at p. 279, and that of Lord Cairns in the same case *sub nom. Rylands* v. *Fletcher* (1868), L. R., 3 H. L. at p. 339. But the liability for non-natural user imposed on a landowner by *Rylands* v. *Fletcher* will not arise if his neighbour uses his property in a non-natural manner and so causes it to be susceptible to injury, *see Eastern and South African Telegraph Co.* v. *Capetown Tramways Companies* (1902), App. Cas., 381.

[2] *National Telephone Co.* v. *Baker* (1893), 2 Ch., 186; *Eastern and South African Telegraph Co.* v. *Cape Tramways Companies* (1902), App. Cas., 381.

[3] *Ibid. See* also *Vaughan* v. *Taff Vale Ry. Co.* (1860), 5 H. & N., 679; *Madras Ry. Co.* v. *Zemindar of Carvatenagaram* (1874), L. R., 1 Ind. App. at p. 384. But such powers in order to

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English decisions.

Thus, it has been held that a railway company authorised by statute to use locomotive engines are not responsible for damage from fire caused by sparks from such engines.[1]

Indian decisions.

Similarly, in India, in cases where owing to special conditions of cultivation and irrigation the storage of water is essential always to the welfare, and often to the existence, of a large portion of the population, and is frequently a matter of positive duty, the principle of *Rylands* v. *Fletcher* has been held inapplicable.[2]

Vis major. *Nichols* v. *Marsland.*

As regards *vis major*, *Nichols* v. *Marsland*,[3] which on that ground was distinguished from *Fletcher* v. *Rylands*,[4] decides that a landowner who stores water on his own land and uses all reasonable care to keep it safely there is not liable for injury caused to his neighbour by its escape if it was brought about by some means beyond his control, such as a storm which amounts to *vis major*, or the act of God, in the sense that it is *practically*, though not *physically*, impossible to prevent it.

But it is doubtful whether this rule could be uniformly applied to any source of danger or mischief kept on the land; as, for example, to the case of a tiger being kept on a man's land and escaping by lightning breaking its chain.[5]

Vis major in India.

In India, the principle of *Nichols* v. *Marsland* has been followed in cases of a similar character.[6]

Principles applicable to the disturbance of natural rights.

The principles applicable to the disturbance of natural rights have already been partly considered in connection with the subject of "nuisances."[7] The following propositions may, however, be usefully added to complete the subject.

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protect from liability must be imperative, and not merely permissive, *Canadian Pacific Ry.* v. *Parke* (1899), App. Cas., 535. And *à fortiori* an unauthorised user would not be protected, *Jones* v. *Festiniog Ry. Co.* (1868), L. R., 3 Q. B., 733.

[1] *Vaughan* v. *Taff Vale Ry. Co*, *ubi sup.*

[2] *Madras Ry. Co.* v. *Zemindar of Carvatenagaram* (1874), L. R., 1 Ind. App., 364; and *see Ram Lall Singh* v. *Lill Dhary Mahton* (1877), I. L. R., 3 Cal., 776.

[3] (1875) L. R., 10 Exch., 255.

[4] (1866) L. R., 1 Exch., 265; L. R., 3 H. L., 330.

[5] *Nichols* v. *Marsland*, *ubi sup.* at p. 260, *per* Bramwell, B.

[6] *Madras Ry. Co.* v. *Zemindar of Carvatenagaram* (1874), L. R., 1 Ind. App., 364; *Ram Lall Singh* v. *Lill Dhary Mahton* (1877), I. L. R., 3 Cal., 776.

[7] *See* Chap. IV, Part I, A.

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First—Two things must combine before a person complaining of the invasion of his natural rights is entitled to a remedy.

There must be damage to himself and a wrong committed by another.[1]

Damnum absque injuriâ, or damage sustained without wrong committed, is not sufficient.[2]

Secondly—Injuria sine damno is actionable.[3]

It being the invasion of the legal *right* which gives ground for relief, actual perceptible damage is not indispensable to found the action. If the violation of the right is shewn, the law will presume damage.

Wood v. *Waud*.

The case of *Wood* v. *Waud*[4] provides a good illustration of this principle. In that case the facts found were that the defendants had fouled the water of a natural stream, but that the pollution had done no actual damage to the plaintiffs because the stream was already so polluted by similar acts of millowners above the defendants' mills, and by dyers still further up the stream, and by sewers from the town of Bradford that the particular pollution did not make the water less serviceable than before.

As to this, Pollock, C.B., in delivering the judgment of the Court said[5]: "We think, notwithstanding, that the "plaintiffs have received damage in point of law. They had a "right to the natural stream flowing through the land, in its "natural state, as an incident to the right to the land on "which the watercourse flowed, as will be hereafter more fully "stated; and that right continues, except so far as it may

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[1] *Rex* v. *Commissioners of Pagham* (1828), 8 B. & C., 355, 32 R. R., 406; *Acton* v. *Blundell* (1843), 12 M. & W., 324 (354).

[2] *Ibid.*

[3] *Wood* v. *Waud* (1849), 3 Exch. at p. 772; *Embrey* v. *Owen* (1851), 8 Exch. at p. 368; *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S. at p. 611; *Swindon Water Works Co.* v. *Wilts and Berks Canal Navigation Co.* (1875), L. R., 7 H. L. at p. 705; *Subramaniya* v. *Ramchandra* (1877), I. L. R., 1 Mad., 335; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas. at p. 698; *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* (1904), App. Cas., 301.

[4] (1849) 3 Exch., 748.

[5] At p. 772.

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"have been derogated from by user or by grant to the neigh-
"bouring landowners."

"This is a case, therefore, of an injury to a *right*. The
"defendants, by continuing the practice for twenty years, might
"establish the right to the easement of discharging into the
"stream the foul water from their works. If the dye-works
"and other manufactories and other sources of pollution above
"the plaintiffs should be afterwards discontinued, the plaintiffs,
"who would otherwise have had, in that case, pure water,
"would be compellable to submit to this nuisance, which then
"would do serious damage to them."

Swindon Waterworks Co. v. *Wilts and Berks Canal Nav. Co.*

In *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*,[1] Lord Cairns, L.C., said: "It is "a matter quite immaterial whether, as riparian owners of "*Wayte's* tenement, any injury has now been sustained, or has "not been sustained, by the respondents. If the appellants "are right, they would, at the end of twenty years, by the "exercise of this claim of diversion, entirely defeat the "incident of the property, the riparian rights of *Wayte's* tene-
"ment. That is a consequence which the owner of *Wayte's*
"tenement has the right to come into the Court of Chancery
"to get restrained at once, by injunction, or declaration, as
"the case may be."[2]

Thirdly—Where there is neither *damnum* nor *injuria* no action can be maintained.[3]

Fourthly—Each recurring act of disturbance constitutes a fresh cause of action.[4] In such cases it is the practice of

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[1] (1875) L. R., 7 H. L. at p. 705.

[2] The same principle was emphatically affirmed in *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* (1904), App. Cas., 301.

[3] *Kali Kissen Tagore* v. *Jodoo Lal Mullick* (1879), 5 C. L. R. (P. C.), 97; L. R., 6 Ind. App., 190.

[4] *The Court of Wards* v. *Raja Leelanund Singh* (1870), 13 W. R., 48; *Subramaniya* v. *Ramchandra* (1877), I. L. R., 1 Mad., 335. And *see Grand Junction Canal Co.* v. *Shugar* (1871), L. R., 6 Ch. App., 483; *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), L. R., 8 Ch. App., 125; *Maharani Rajroop Koer* v. *Syed Abul Hossein* (1880), I. L. R., 6 Cal., 394; 7 C. L. R., 529; L. R., 7 Ind. App., 245; *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson, Ltd.* (1908), App. Cas., 27.

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the Court to grant an injunction to avoid a multiplicity of suits.[1]

Fifthly—Every occupier of land is *primâ facie* entitled to enjoy all the rights incident to the possession or ownership thereof without let or hindrance.

Burden of proof.

Hence upon any person claiming to invade those rights lies the burthen of shewing that he is entitled to do so.[2]

Extinction of Natural Rights.

A word as to the extinction of natural rights. It will be remembered that natural rights are not capable of extinction so long as the subject of them continues to exist.

They may be suspended by virtue of an easement, reviving on the extinction of the latter, but neither by non-user nor by any other means short of the destruction of the subject-matter can they be extinguished.[3]

Part II.—Natural Rights to Light and Air.

A.—Natural Right to the flow of Light and Air.

Light and air *publici juris.*

Every owner or occupier of land has a natural right to so much light and air as come vertically thereto.[4]

The right to the lateral passage of light and air over a neighbour's land unobstructed by any act of his can only be the subject of an easement, as already seen.[5]

Light and air are *publici juris*[6]; each man is free to take and use in the lawful enjoyment of his own property so much light and air as come thereto.

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[1] *Att.-Genl.* v. *Council of Borough of Birmingham* (1858), 4 K. & J., 528; *Grand Junction Canal Co.* v. *Shugar, ubi sup.*; *Clowes* v. *Staffordshire Potteries Waterworks Co., ubi sup.*; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35; Specific Relief Act, s. 54 (*e*), App. V.

[2] *Bickett* v. *Morris* (1866), L. R., 1 H. L., Sc., 47 (56); *Humphries* v. *Cousins* (1877), L. R., 2 C. P. D., 239; *Onraet* v. *Kishen Soondaree Dasee* (1871), 15 W. R., 83; *Obhoy Churn Dey* v. *Lukhee Hari Mohan Thakoor* v. *Kissen Sundari* (1884), I. L. R., 11 Cal., 52.

[3] *See* Chapter I, Part I, and *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S. at p. 611; *Roberts* v. *Richards* (1881), 50 L. J. Ch., 297.

[4] Gale on Easements, 8th Ed., p. 314.

[5] Chap. III, Part I.

[6] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J. at p. 43; and *see Baban Mayacha* v. *Nagu Shrarucha* (1876), I. L. R., 2 Bom. at p. 52.

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His neighbour's right is the same as his own, but these rights of enjoyment are mutually qualified, for neither owner can prevent the other from making such lawful use of his land as he pleases.

Neighbours' rights to light and air mutually qualified.

In this respect there is a distinction between the right to light and air and the right to the flow of water in a defined channel, and to the support of soil by soil, for in the case of light and air, there is not, as in the case of the other two rights, any original right of enjoyment which imposes a corresponding obligation on another.[1]

Distinguishable from natural rights in water and the natural right of support.

The man who deprives his neighbour of the accustomed flow of water in a defined channel, or of the support to his land, infringes a well recognised right of property unless he can prove an easement in justification.[2]

But the man who is deprived of light and air by the acts of his neighbour, such as the erection of buildings, has still the right to so much light and air as come to him, but he cannot complain of the obstruction, however serious, unless he can establish his title to an easement of light and air.[3]

Bryant v. *Lefever*.

The nature and extent of these natural rights are succinctly defined in the judgment of Bramwell, L.J., in the case of *Bryant* v. *Lefever*.[4] He says[5]: "What, then, is the "right of land and its owner or occupier? It is to have all "natural incidents and advantages, as nature would produce "them; there is a right to all the light and heat that would "come, to all the rain that would fall, to all the wind that

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[1] *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 753.

[2] *See infra*, Parts III and IV, and Chap. III, Parts III and IV.

[3] For the natural rights of property, as defined by the maxim, "*Cujus est solum ejus usque ad cœlum*," enable a man to build as he pleases on his own land subject to the obligation that he shall not obstruct ancient lights. By virtue of the same rights of property and the application of the same maxim, the projection of beams and cornices over another's land are an encroachment and actionable, unless such projection has been made lawful by grant, reservation, or other means, *see* Gale, *ubi sup.* But such lawful diminution of the rights of ownership does not extend beyond the protrusion itself, so that the owner thereof cannot prevent the owner of the soil from erecting a building overhanging the protrusion, *Corbett* v. *Hill* (1870), L. R., 9 Eq., 671; *Harris* v. *De Pinna* (1886), 33 Ch. D., 238 (260); *Ranchod Shamji* v. *Abdulabhai Mithabhai* (1904), I. L. R., 28 Bom., 428.

[4] (1879) L. R., 4 C. P. D., 172.

[5] *Ibid.* at p. 175.

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"would blow; a right that the rain which would pass over the "land should not be stopped and made to fall on it; a right "that the heat from the sun should not be stopped and re- "flected on it; a right that the wind should not be checked, "but should be able to escape freely; as if it were possible that "these rights were interfered with by one having no right, no "doubt an action would lie. But these natural rights are "subject to the rights of adjoining owners, who, for the benefit "of the community, have and must have rights in relation to "the use and enjoyment of their property that qualify and "interfere with those of their neighbours' rights to use their "property in various ways in which property is lawfully and "commonly used."

"A hedge, a wall, a fruit tree, would each affect the land "next to which it was planted or built. They would keep off "some light, some air, some heat, some rain, when coming "from one direction, and prevent the escape of air, of heat, "of wind, of rain, when coming from the other. But nobody "could doubt that in such case no action would lie; nor will "it in the case of a house being built and having such conse- "quences. That is an ordinary and lawful use of property, "so much so as the building of a wall, or planting of a fence "or an orchard."

B.—Natural Right to the Purity of Air.

Every man has a natural right to the purity of air coming to his land.[1]

It is essential to the health of the community that this should be so.

Consequently private health is considered of greater importance than public benefit.[2]

Pollution not always actionable.

But it is not every pollution that will give a cause of action.

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[1] I. E. Act, s. 7 (*b*), ill. (*b*), App. VII. This natural right may be restricted by the acquisition of an easement to pollute air, I. E. Act, s. 7 (*b*), App. VII; and *see Bliss* v. *Hall* (1838), 4 Bing. N. C., 183; *Flight* v. *Thomas* (1839), 10 A. & E., 590; *Crump* v. *Lambert* (1867), L. R., 3 Eq., at p. 413.

[2] *See* Chap. IV, Part I, A.

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In some cases discomfort of itself is not a sufficient ground for relief.[1]

The question whether or not the Court will grant relief for mere discomfort largely depends on the nature of the locality where the pollution complained of occurs.[2] Mere discomfort.

In a town a man must accept the discomfort which may arise from the necessary operations of trade in his vicinity, whereas in other localities he may not be liable to submit to it.[3]

In any case, the discomfort must be such as to materially interfere with the ordinary comfort of human existence.[4]

The question whether such discomfort is or is not material must depend *inter alia* on the habits and circumstances of the person complaining of the pollution, the conditions of the climate in which he lives, and the relative positions of the two properties.[5]

What would not be material discomfort in England might very well be material discomfort in India, and *vice versâ*.

Walter v. *Selfe*[6] is an instructive case on this point. There the plaintiff, the owner of a dwelling-house in a rural district, complained of the burning of bricks by the defendant on his adjoining land which, though not dangerous to health, was so offensive as to cause serious discomfort to himself and the inmates of his house. *Walter* v. *Selfe*.

In the circumstances of the case the plaintiff was held entitled to an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family.

"Untainted" and "unpolluted" air was considered to mean not necessarily air as fresh, free, and pure as at the time of building the plaintiff's house the atmosphere then was, but air not rendered, to an important degree, less compatible, or, at least, not rendered incompatible, with the physical comfort

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[1] *Ibid.*

[2] *Ibid.*

[3] *Ibid.*

[4] *Walter* v. *Selfe* (1851), 4 De G. & S., 315; 20 L. J. Ch., 433; *Crump* v. *Lambert* (1867), L. R., 3 Eq., 409; *Fleming* v. *Hislop* (1886), 11 App. Cas., 686.

[5] *Walter* v. *Selfe*, *ubi sup.*

[6] (1851) 4 De G. & S., 315; 20 L. J. Ch., 433.

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of human existence, a phrase to be understood with reference to the climate and habits of England.

The Court was further of opinion that the pollution of the plaintiff's air, though not injurious to health, was none the less a nuisance to be relieved against in causing serious and material discomfort according to plain, simple, and sober notions amongst the English people.

"Material discomfort."

"'Material discomfort' means such discomfort as excludes "any sentimental, speculative, trivial discomfort or personal "annoyance, a thing which the law may be said to take no "notice of and to have no care for."[1]

Terms of injunction.

The terms of the injunction granted in cases of pollution of air usually are that the defendant, his servants, workmen, and agents be restrained from using the subject of the nuisance in such manner as to occasion damage or annoyance to the plaintiff.[2]

Part III.—Natural Rights in Water.

It will be convenient to enumerate the headings under which it is proposed to divide this branch of the subject.

A.—Natural Rights in Streams or Rivers.

(1) *Generally.*

(2) *Right of riparian proprietors to the use and consumption of water.*

(3) *Right of riparian proprietors to the purity of water.*

(4) *Rights of riparian proprietors to protect their lands from the operation of floods.*

B.—Natural Rights in Natural Lakes or Ponds.

C.—Miscellaneous Natural Rights in Water.

D.—Alienation of Natural Rights in Water.

E.—Disturbance of Natural Rights in Water and Remedies therefor.

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[1] *Per* Lord Selborne in *Fleming* v. *Hislop* (1886), 11 App. Cas. at p. 690.

[2] *Walter* v. *Selfe* (1851), 3 De G. & S., 315; 20 L. J. Ch., 433; *Crump* v. *Lambert* (1867), L. R., 3 Eq., 409; *Rosken* v. *Whitworth* (1871), 19 W. R., 804; *Goose* v. *Bedford* (1873), 21 W. R., 449; and *see Fleming* v. *Hislop* (1886), L. R., 11 App. Cas., 686, and Chap. IV, Part I, A.

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A.—Natural Rights in Streams or Rivers.

(1) *Generally.*

All riparian proprietors (which term is usually applied to all those who have the occupation or ownership of lands abutting on running streams or rivers) [1] have certain natural rights in natural streams or rivers flowing past their lands.

Character of natural rights in water.

In natural streams flowing past his land each riparian proprietor has certain natural rights. These rights are not rights of ownership in the water, but rights to the usufruct of the water.[2]

They do not depend upon a grant or upon the ownership of the soil of the stream, but are *jure naturæ* incident to the ownership of the soil of the land abutting upon the stream.[3]

Thus it has been said that natural watercourses are like ways of necessity.[4]

Natural rights only in natural streams.

Natural rights in "private streams" are limited to such private streams as can be described as "Natural." [5]

Meaning of "stream."

In its ordinary sense, "stream" means water running in

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[1] *See Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), 11 Q. B. D. at pp. 169, 170, 172.

[2] *Wood* v. *Waud* (1849), 3 Exch. at p. 775; and *see Mason* v. *Hill* (1833), 5 B. & Ad. at p. 24; 2 Nev. & Man. at pp. 764, 765; *Embrey* v. *Owen* (1851), 6 Exch., 353; *Dinkar* v. *Narayan* (1905), I. L. R., 29 Bom., 357.

[3] *Rawstron* v. *Taylor* (1855), 11 Exch. at p. 382; *Chasemore* v. *Richards* (1859), 7 H. L. C. at pp. 379, 382; *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C., 300; *Court of Wards* v. *Raja Leelaland Singh* (1870), B. W. R., 48; *Lyon* v. *Fishmongers Co.* (1876), 1 App. Cas., 662; 46 L. J. Ch., 68; 35 L. T., 569; 25 W. R., 165; *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (1878), 4 App. Cas., 121; L. R., 6 Ind. App., 33; I. L. R., 4 Cal., 633; *North Shore Ry. Co.* v. *Pion* (1889), 14 App. Cas. (P. C.), 612; 59 L. J. P. C., 25; 61 L. T. (P. C.), 525. Thus the right to the enjoyment of the water belongs to the occupant of the bank, whatever the nature of his tenancy. *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (1878), I. L. R., 7 Bom., 209.

[4] *Rawstron* v. *Taylor, ubi sup.*

[5] *Wood* v. *Waud* (1849), 3 Exch., 748; *Rawstron* v. *Taylor* (1855), 11 Exch., 369; *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S., 611; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46. This is the general rule. There is, however, an exception to this rule in the case of the pollution of water, *see infra* (3) under "Right of riparian proprietors to the purity of water."

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a defined channel,[1] and it is in this sense that it must here be used in connection with the rights of riparian owners.

Meaning of "natural stream."

A "natural stream" is a stream that flows at its source by the operation of nature, and in a defined channel.[2]

Natural streams must be known and defined.

All natural streams, in order to be the subject of natural rights, must flow in known and defined channels, whether on the surface of the land or underground.[3]

Natural streams may be intermittent or permanent.

And it seems that natural rights can exist in the intermittent, as well as permanent natural streams.[4]

Definition of artificial stream.

It has already been seen that there are no natural rights in artificial streams,[5] but for the purposes of this distinction between natural and artificial streams it is necessary to ascertain what an artificial stream really is.

Gared v. *Martyn*.

The case of *Gared* v. *Martyn*[6] indicates that an artificial stream must be taken as the converse of a natural stream, and is, therefore, a stream which flows at its source by the operation of man.

Character of natural stream which is used artificially or joined by an artificial stream.

It remains to be seen what is the character of a stream which starting as a natural stream is afterwards conducted in a particular direction by artificial means, and whether when a natural stream is joined by an artificial stream it retains or changes its original character in contemplation of law.

It appears from the authorities that a stream, if flowing in a permanent channel underground or on the surface whether it be called a natural stream as being one originally, or an artificial stream in regard to the particular means

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[1] *Taylor* v. *Corporation of St. Helens* (1877), 6 Ch. D. at p. 273; *McNab* v. *Robertson* (1897), App. Cas., 129; 66 L. J. P. C., 27; 75 L. T., 666.

[2] *See Gared* v. *Martyn* (1865), 19 C. B. N. S., 732; and I. E. Act, s. 7, explanation, App. VII.

[3] *Acton* v. *Blundell* (1843), 12 M. & W., 324; *Embrey* v. *Owen* (1851), 6 Exch., 353; *Rawstron* v. *Taylor* (1855), 4 Exch., 369; *Broadbent* v. *Ramsbotham* (1855), 11 Exch., 602; *Dudden* v. *Guardians of the Clutton Union* (1857), 1 H. & N., 627; *Chasemore* v. *Richards* (1859), 7 H. L. C., 349.

[4] *Drewett* v. *Sheard* (1836), 7 C. & P., 465; *Trafford* v. *Rex* (1832), 8 Bing., 204, 34 R. R., 680; *Narayan* v. *Keshav* (1898), I. L. R., 23 Bom., 506; I. E. Act, s. 7, explanation, App. VII.

[5] *See Ramessur Pershad Narain Singh* v. *Koonj Behari Pattuk* (1878), I. L. R., 4 Cal., 633; L. R., 6 Ind. App., 33; 4 App. Cas., 121; and Chap. III, Part III, B.

[6] (1865) 19 C. B. N. S., 732.

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employed, must be regarded as possessing the incidents of a natural stream, conferring similar rights, and imposing similar obligations.[1]

Sutcliffe v. *Booth*[2] was an action by one riparian proprietor against another for the pollution and diversion of a watercourse. The watercourse in question, as far as living memory went, had been used as a sewer, and the greater part of it had been bricked over, but it was admittedly, in its origin, a stream that was probably a natural stream, as there were various natural streams draining into it, and the conformation of the ground suggested the previous existence of a natural stream of some kind. *Sutcliffe* v. *Booth*.

On motion for a new trial it was held that it was a misdirection to tell the jury that if the stream was artificial and made by the hand of man the plaintiff had no cause of action.

In *Nuttall* v. *Bracewell*,[3] Channell, B., said he saw no reason why the law applicable to ordinary running streams and governing the rights of riparian proprietors on the banks thereof should not be applicable to a natural stream though flowing in an artificial channel, as was held in *Sutcliffe* v. *Booth*,[4] though the case of an entirely artificial stream, as one flowing from a river, might be different. *Nuttall* v. *Bracewell*.

The case of *Holker* v. *Porritt*[5] is in point. There a natural stream divided itself into two branches; one branch running down to the river *Irwell*, the other running to a place where it formerly emptied itself into a watering trough, and the overflow, without forming itself into any visible stream, diffused itself over the surface of the ground and discharged itself by percolation through the surface or in small rills into the *Irwell*. *Holker* v. *Porritt*.

The owner of the land on which the trough stood collected

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[1] *Sutcliffe* v. *Booth* (1863), 9 Jur. N. S., 1037; 32 L. J. Q. B., 136; *Nuttall* v. *Bracewell* (1866), L. R., 2 Exch., 1; *Holker* v. *Porritt* (1873), L. R., 8 Exch., 107; *Roberts* v. *Richards* (1881), 50 L. J. Ch., 297; *Bailey & Co.* v. *Clark, Son & Morland* (1902), 1 Ch., 649.

[2] (1863) 9 Jur. N. S., 1037; 32 L. J. Q. B., 136.

[3] (1866) L. R., 2 Exch., 9 (14).

[4] *Ubi sup.*

[5] (1873) L. R., 8 Exch., 107.

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the overflow into a reservoir and thence conducted it by a culvert to his mill which stood on the banks of the *Irwell*. Thereafter he sold the mill with all water rights to the plaintiff, and the plaintiff sued the defendant for obstructing the flow of water to his mill.

The Court being of opinion that such artificial operations could not divest the stream of its former incidents, and that on the completion of the culvert the proprietor of the mill became possessed of the same rights as the proprietors on the banks of a natural stream, it was held that the plaintiff could maintain the action.

Roberts v. *Richards.*

In *Roberts* v. *Richards*[1] the defendant was appropriating for the use of newly built houses nearly all the water of a small stream which, originating in a natural spring on the plaintiff's land, passed next through the defendant's land and then through the plaintiff's land to his house. The plaintiff alleged that so much of the stream as flowed through the defendant's land was artificial and had been constructed at a time immemorial for the benefit of the plaintiff and his predecessors. It was held, on the authority of *Sutcliffe* v. *Booth*,[2] that as it could not be told when the artificial part of the stream, if any, had been constructed, it must be deemed to be a natural stream, but if it was in fact artificial it had been constructed so as to give all the rights of a riparian owner to the defendant and his predecessors in title.

Bailey & Co. v. *Clark, Son & Morland.*

In *Bailey & Co.* v. *Clark, Son & Morland*,[3] the plaintiffs were the owners of a mill which was situate upon an artificial cut or channel through which water flowed from a natural river and was used for working the mill. The plaintiffs also owned a factory near the mill but a little higher up the stream. For the purposes of the factory the plaintiffs abstracted water from the stream flowing through the artificial cut and returned the same quantity of water to the stream below the mill. The defendants owned a factory higher up the same stream, and

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[1] (1881) 50 L. J. Ch., 297.

[2] *Ubi sup.*

[3] (1902) 1 Ch., 649.

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for the purposes of their factory abstracted water therefrom, returning it diminished in quantity by evaporation.

The plaintiffs, claiming a right to the whole of the water in the channel as being an artificial stream, sought to restrain the defendants from abstracting water so as to injure their mill. The artificial stream was known to have existed for some centuries, but there was no evidence as to when or by whom or on what conditions it had been originally constructed. The defendants' factory was situate on the site of an old tannery for the purposes of which water used to be withdrawn from the stream. There had also formerly been a fulling mill upon the stream above the plaintiffs' mill.

It was held by the Court of Appeal, following *Sutcliffe* v. *Booth*,[1] that the origin of the artificial watercourse being unknown the proper inference to be drawn from the user of the water and the other circumstances was that the channel was originally constructed upon the terms that all the riparian proprietors should have the same rights (including a right to use the water for manufacturing purposes) as they would have had if the stream had been a natural one.

The principle established in these cases has been thought to be open to objection for the reasons pointed out by Mr. Goddard in his work on Easements.[2] The question is of importance not only to the person claiming the right, but to other landowners, as involving various considerations affecting the rights and obligations attaching to the enjoyment of the stream.

But it is difficult to suppose that these considerations were not present to the minds of the learned judges who decided those cases, and the foundation of their opinion seems to be that if a man expends his labour in conducting a natural stream through an artificial channel without thereby affecting the rights of other landowfiers, it is only reasonable that he should be taken to possess the same rights in that stream as in a stream flowing in a natural channel.[3]

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[1] *Ubi sup.*

[2] 6th Ed., p. 82.

[3] As to the rights of riparian proprietors in an artificial stream, generally, or as

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The effect of an artificial stream flowing into a natural stream is to cause the former to become part of the latter as soon as it reaches it.[1]

Riparian tenement must abut naturally on the stream.

In order to give rise to riparian rights the tenements in respect of which the rights are claimed must abut on the stream or river in the ordinary and regular course of nature, and for this purpose lateral contact is as effectual, *jure naturæ*, as vertical contact.[2]

Relative rights and obligations of riparian proprietors on natural private streams.

With regard to the rights of riparian proprietors in natural private streams it may be stated as a general proposition, established both in England and in India, that every riparian proprietor has, subject to similar natural rights of upper and lower proprietors, the right to have water come to him in its ordinary and accustomed course, undiminished in flow, quantity, and quality, and unaffected in temperature, and to go from him without obstruction.[3]

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subject to some special or larger right of one of themselves, *see Bailey & Co.* v. *Clark, Son & Morland* (1902), 1 Ch., 649.

[1] *Wood* v. *Waud* (1849), 3 Exch. at p. 779.

[2] *Lyon* v. *Fishmongers Co.* (1876), 1 App. Cas., 662; 46 L. J. Ch., 68; 35 L. T., 569; 25 W. R., 165; *North Shore Ry. Co.* v. *Pion* (1889), 14 App. Cas. (P. C.), 612; 59 L. J. (P. C.), 25; 61 L. J. (P. C.), 525.

[3] *Wright* v. *Howard* (1823), 1 Sim. & Stu., 190; *Mason* v. *Hill* (1833), 5 B. & Ad., 1; 2 Nev. & Man., 747; *Embrey* v. *Owen* (1851), 6 Exch., 353; *Miner* v. *Gilmour*, (1858), 12 Moo. P. C., 156; *Chasemore* v. *Richards* (1859), 7 H. L. C. at p. 382; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1875), L. R., 7 H. L., 697; *Kensit* v. *Great Eastern Ry. Co.* (1884), 27 Ch. D. at p. 130; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas., 691; *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* (1904), App. Cas., 301; *John White & Sons* v. *J. & M. White* (1906), App. Cas., 72; *Sheikh Monoour Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218; *Court of Wards* v. *Raja Leelaland Singh* (1870), 13 W. R., 48; *Baboo Chumroo Singh* v. *Mullick Khyrub Ahmed* (1873), 18 W. R., 525; *Ramessur Pershad Narain Singh* v. *Koonj Behari Pattuk* (1878), I. L. R., 4 Cal., 633; L. R., 6 Ind. App., 33; L. R.; 4 App. Cas., 121; *Debi Pershad Singh* v. *Joynath Singh* (1897), I. L. R., 24 Cal., 865 (P. C.); L. R., 24 Ind. App., 60; *Sangili* v. *Sundaram* (1897), I. L. R., 20 Mad., 279; *Narayan* v. *Keshav* (1898), I. L. R., 23 Bom., 506; *Dinkar* v. *Narayan* (1905), I. L. R., 29 Bom., 357; *Eshan Chandra Samanta* v. *Nilmoni Singh* (1908), I. L. R., 35 Cal., 851; and *see* I. E. Act, s. 7, ill. (*h*), App. VII. As to the right of riparian proprietors to have the water come to them unaffected in temperature, *see* specially *Mason* v. *Hill, ubi sup.*; *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), 11 Q. B. D., 155; *John Young & Co.* v. *Bankier Distillery Co., ubi sup.*

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Thus, as was said by Baron Parke in *Embrey* v. *Owen*,[1] while referring to the right of a riparian owner in the water flowing past his land, "The right to the benefit and advantage "of the water flowing past his land is not an absolute and "exclusive right to the flow of *all* the water in its natural state " . . . but it is a right only to the flow of the water, and "the enjoyment of it, subject to the similar rights of all the "proprietors of the banks on each side to the reasonable "enjoyment of the same gift of Providence.[2]

Embrey v. *Owen*.

And every riparian proprietor has the same rights and is under the same obligations as his co-proprietors, whether he be a proprietor at the source, or at the end, of the particular stream, or an intermediate proprietor.[3]

Where the two sides of a private stream belong to different owners, the soil of the bed of the stream is not the common property of the respective owners, but is presumed to belong to each in severalty *usque ad medium filum aquæ*.[4]

Presumption of ownership of soil of private stream.

The respective and relative rights and obligations of opposite proprietors in the use and enjoyment of the water of a stream or non-tidal and non-navigable river flowing between their respective lands were considered and defined by the House of Lords in the important case of *Bickett* v. *Morris*.[5]

Relative rights and obligations of opposite riparian proprietors on private streams or rivers.

Bickett v. *Morris*.

In that case the appellant and respondent were owners of property directly opposite each other on the banks of a river. It was agreed that the appellant should build into the *alveus* up to a certain fixed point, and the appellant in pursuance of such agreement proceeded so to build; but as his building

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[1] *Ubi sup.*

[2] At p. 369. And *see Dinkar* v. *Narayan* (1905), I. L. R., 29 Bom., 357; I. E. Act, s. 7, ill. (*j*), App. VII.

[3] *Wright* v. *Howard* (1823), 1 Sim. & Stu., 190; *Dudden* v. *Guardians of the Clutton Union* (1857), 1 H. & N., 627.

[4] *Bickett* v. *Morris* (1866), L. R., 1 H. L. Sc. 47; *Hunooman Dass* v. *Shama Churn Bhutta* (1862), 1 Hay, 426; *Bhageeruthee Dabee* v. *Grish Chunder Chowdhry* (1863), 2 Hay, 541; *Kali Kissen Tagore* v. *Jadoo Lall Mullick* (1879), 5 C. L. R. (P. C.), 97; L. R. 6 Ind. App., 190. And *see Great Torrington Commons Conservators* v. *Moore Stevens* (1904), 1 Ch., 347. For extent of presumption where an ancient island divides the stream, *Ibid.* As to what is a private stream, *see* Chap. IV, Part I B (2), 3 (*a*).

[5] (1866) L. R., 1 H. L. Sc., 47.

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operations extended beyond the point agreed upon, the respondents applied to the Court of Session in Scotland for a suspension and interdict against him, and brought an action to have it declared that he had no right to erect buildings on the *solum* of the river beyond the point agreed upon.

The case eventually came up to the House of Lords, and the decision of that tribunal laid down the following principles :—

(*a*) Neither of two opposite riparian proprietors is entitled to use the stream or river in such a way as to interfere with its natural flow.[1]

(*b*) He cannot even protect his land from inundation if the means employed for such protection causes actual injury to the property of the opposite proprietor.[2]

(*c*) An obstruction to the current of a stream is an injury of which the Courts will take notice even though immediate damage cannot be described or actual loss predicated.[3]

Rights and obligations of riparian proprietors on public rivers.

Riparian owners on a public (*i.e.* tidal navigable) river have, in addition to the right of navigation to which they are entitled as members of the public, all the rights of riparian owners on a private stream or river (including a right of access to and from the river) subject to the public right of navigation, and *inter se* are under the same obligations.[4]

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[1] *See* also *Sheikh Monoour Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218; *Att.-Genl.* v. *Earl of Lonsdale* (1868), L. R., 7 Eq. at p. 387.

[2] *Att.-Genl.* v. *Earl of Lonsdale*, *ubi sup.* *See* also *Venkatachalam Chettiar* v. *Zemindar of Sivaganga* (1904), I. L. R., 27 Mad., 409. But *contra*, apparently in the case of an extraordinary or accidental flood, *Menzies* v. *Breadalbane* (1828), 1 Bligh, N. R., 414 (420), 32 R. R., 103 (108); *Venkatachalam Chettiar* v. *Zemindar of Sivaganga* (1904), I. L. R., 27 Mad., 409, 411, or where by prescription or custom riparian proprietors can embank against each other, *Ibid.*

[3] And *see Earl of Norbury* v. *Kitchin* (1866), 15 L. T. N. S., 501. The obstruction must be one which sensibly alters the flow of water, *Kalikissen Tagore* v. *Jodoo Lall Mullick* (1879), 5 C. L. R. (P. C.), 97; L. R., 6 Ind. App., 190.

[4] In order to give rise to riparian right in a tidal river it is necessary that the bank should be in natural daily contact with the stream laterally or vertically, *North Shore Ry. Co.* v. *Pion* (1889), 14 App. Cas. (P. C.), 612; 59 L. J. P. C., 25; 61 L. T. (P. C.), 525. But, apparently, in India a tidal *khal* or creek may be so much the property of Government as to exclude the ordinary riparian rights

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Thus, if the natural condition of a public river in regard to the use and enjoyment of the water for all the usual purposes of the land be interfered with, the riparian owner who is thereby injured may maintain an action for the private injury, and is not bound to stand upon his right as one of the public to complain only of a nuisance or an interruption to navigation.

Lyon v. *Fishmongers Co.*

Such is the effect of the decision in *Lyon* v. *Fishmongers Co.*[1] This decision was followed in the later case of *North Shore Railway Co.* v. *Pion*,[2] and held to be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*.

North Shore Ry. Co. v. *Pion.*

Possible acquisition of riparian rights as against Government.

In India, as between Government and riparian owners, it has been held that, assuming Government has the right to regulate in the interests of the public the enjoyment and benefit of the water in rivers and natural streams, a right to use the water for irrigation may be acquired by long user, from which an *animus dedicandi* on the part of Government will be presumed.[3]

Pleadings.

In an action for an interference with riparian rights the plaintiff must state that he, as riparian owner, is entitled to the flow of the water as it had been accustomed to flow, and that such flow has been seriously and sensibly diverted (or otherwise interfered with) so as to be an injury to his rights.[4]

(2) *Rights of riparian proprietors to the use and consumption of water.*

Nature and general extent of the rights.

The right of a riparian proprietor to have the water of a running stream on the banks of which his property lies flow down to his property as it has been accustomed to flow down

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unless they can be established as an easement, *Kalikissen Tagore* v. *Jodoo Lall Mullick*, *ubi sup.*

[1] (1876), 1 App. Cas., 662; 46 L. J. Ch., 68; 35 L. T., 569; 25 W. R., 165. And *see* to the same effect, *Att.-Genl.* v. *Lord Lonsdale* (1868), L. R., 7 Eq., 377.

[2] *Ubi sup.*

[3] *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (1878), I. L. R., 7 Bom., 209.

[4] *Kali Kissen Tagore* v. *Jodoo Lall Mullick* (1879), 5 C. L. R. (P. C.), 97; L. R., 6 Ind. App., 190.

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is subject to the ordinary use of the flowing water by the other riparian proprietors on the same stream and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances.[1]

According to the civil law and the old English authorities flowing water was said to be *publici juris*.[2]

This gave rise to a misconception of the extent of the right to use and consume flowing water, and it was asserted that if flowing water was *publici juris*, the first appropriation of it to any *useful purpose* gave the person appropriating it a title against other riparian owners so as to deprive them of the benefit of the natural flow of water unless they had already made a beneficial use of the stream.

Mason v. *Hill*; *Embrey* v. *Owen*.

This misconception was corrected in two very important cases, *Mason* v. *Hill*[3] and *Embrey* v. *Owen*,[4] in which it was successively laid down by judges of great eminence that flowing water is *publici juris*, not in the sense that it is *bonum vacans* to which the first occupant may acquire an exclusive right, but in the sense only that all may reasonably use it who have a right of access to it, and that none can have property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of the possession only.[5]

Orr Ewing v. *Colquhoun*.

And in *Orr Ewing* v. *Colquhoun*[6] Lord Blackburn pointed out that the case of *Mason* v. *Hill* has settled the law that a riparian proprietor has, as incident to his property in the land, a proprietary right to have the stream flowing past his land flow in its natural state, neither increased nor diminished, and this quite independently of whether he has yet made use of it, or, to use a former phrase, appropriated the water. And the statement of the law by Lord Kingsdown in *Miner* v. *Gilmour*[7]

Miner v. *Gilmour*.

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[1] *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas., 691 (698).

[2] *See Mason* v. *Hill* (1833), 5 B. & Ad., 1; 2 Nev. & Man., 747; *Embrey* v. *Owen* (1851), 6 Exch., 353.

[3] (1833) 5 B. & Ad., 1.; 2 Nev. & Man., 747.

[4] (1851) 6 Exch., 353.

[5] *See* this view adopted in *Perumal* v. *Ramasami* (1887), I. L. R., 11 Mad., 16 (21).

[6] (1877) L. R., 2 App. Cas. at p. 854.

[7] (1858) 12 Moo. P. C., 158.

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points to the same conclusion. Since these decisions the dictum of Tindal, C.J., in *Liggins* v. *Inge*, that flowing water is *publici juris* giving the first person who appropriates any part of it flowing past his own land to his own use, the right to the use of so much as he thus appropriates against any other, can no longer be regarded as law.[1]

The law relating to the use and consumption of water is perspicuously stated in Kent's Commentaries,[2] and as this statement of the law was adopted by the Court in *Embrey* v. *Owen*,[3] it will be useful to reproduce it here.

Statement of law as to the use and consumption of water.

"Every proprietor of lands on the banks of a river has "naturally an equal right to the use of the water which flows "in the stream adjacent to his lands, as it was wont to run "(*currere solebat*), without diminution or alteration. No pro- "prietor has a right to use the water to the prejudice of other "proprietors, above or below him, unless he has a prior right "to divert it, or a title to some exclusive enjoyment. He has "no property in the water itself but a simple usufruct as it "passes along. '*Aqua currit et debet currere*' is the language "of the law. Though he may use the water while it runs "over his land, he cannot unreasonably detain it or give it "another direction, and he must return it to its ordinary "channel when it leaves his estate.[4] Without the consent of "the adjoining proprietors he cannot divert or diminish the "quantity of water which would otherwise descend to the "proprietors below, nor throw the water back upon the pro- "prietors above, without a grant, or an uninterrupted enjoy- "ment of twenty years, which is evidence of it. This is the "clear and settled doctrine on the subject, and all the difficulty "that arises consists in the application. The owner must so "use and apply the water as to work no material injury or

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[1] *See per* Cave, J., in *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), L. R., 11 Q. B. D. at p. 161.

[2] 3 Kent's Comm. Lect., 52, pp. 439 *et seq.*

[3] (1851) 6 Exch. at p. 369.

[4] This explains the natural right of a riparian proprietor to have water come to him in its ordinary and accustomed course, *Kensit* v. *Great Eastern Ry. Co.* (1884), 27 Ch. D. at p. 131.

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"annoyance to his neighbour below him who has an equal "right to the subsequent use of the same water; nor can he "by dams or any obstruction cause the water injuriously to "overflow the grounds and springs of his neighbour above "him. Streams of water are intended for the use and comfort "of man; and it would be unreasonable, and contrary to "the universal sense of mankind, to debar every riparian "proprietor from the application of the water to domestic, "agricultural, and manufacturing purposes, provided the "use of it be made under the limitations which have been "mentioned,[1] and there will, no doubt, inevitably be, in the "exercise of a perfect right to the use of the water, some "evaporation and decrease of it, and some variations in the "weight and velocity of the current. But *de minimis non* "*curat lex*, and a right of action by the proprietor below would "not necessarily flow from such consequences, but would "depend upon the nature and extent of the complaint or injury "or the manner of using the water. All that the law requires "of the party, by or over whose land a stream passes, is that "he should use the water in a reasonable manner, and so as "not to destroy, or render useless, or materially diminish, or "affect, the application of the water by the proprietors above "or below on the stream. He must not shut the gates of his "dams and detain the water unreasonably, or let it off in "unusual quantities to the annoyance of his neighbour. "Pothier lays down the rule very strictly that the owner of "the upper stream must not raise the water by dams, so as "to make it fall with more abundance and rapidity than it "would naturally do and injure the proprietors below. But "this rule must not be construed literally, for that would be "to deny all valuable use of the water to the riparian pro- "prietors. It must be subjected to the qualifications which "have been mentioned, otherwise rivers and streams of water "would become utterly useless, either for manufactories or

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[1] *See Dinkar* v. *Narayan* (1905), I. L. R., 19 Bom., 357; I. E. Act, s. 7, ill. (*j*); App. VII.

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"agricultural purposes. The just and equitable principle is "given in the Roman Law: '*Sic enim debere quem meliorem "'agrum suum facere, ne vicini deteriorem faciat.*'"

Ordinary and extraordinary use of water.

According to this statement of the law the present topic may conveniently be divided into two parts, one as regards what is commonly called the ordinary, or primary, use of water, and the other as regards what is commonly called the extraordinary, or secondary, use of water.

Miner v. *Gilmour.*

This division of the subject was made use of in the well-known case of *Miner* v. *Gilmour*,[1] where Lord Kingsdown in delivering the judgment of the Privy Council stated the rule in terms which have since been generally adopted[2]—

"By the general law applicable to running streams, every "riparian proprietor has a right to what may be called the "ordinary use of the water flowing past his land; for instance, "to the reasonable use of the water for his domestic purposes "and his cattle, and this without regard to the effect which "such use may have, in a case of deficiency, upon proprietors "lower down the stream."[3]

"But, further, he has a right to the use of it for any pur-"pose, or what may be deemed the extraordinary use of it, "provided that he does not thereby interfere with the rights of "other proprietors, either above or below him."

"Subject to this condition, he may dam up the stream for "the purpose of a mill, or divert the water for the purpose of "irrigation."

"But he has no right to interrupt the regular flow of the "stream, if he thereby interferes with the lawful use of the

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[1] (1858) 12 Moo. P. C., p. 155.

[2] *See John White & Sons* v. *J. & M. White* (1906), App. Cas., 79, 80.

[3] In *Lord Norbury* v. *Kitchin* (1863), 3 F. & F., 292; 9 Jur. N. S., 132, it was on a motion for a new trial questioned whether the doctrine had not been too broadly stated by Lord Kingsdown, but it was unnecessary to decide the point, as the Court found the defendant had not taken an unreasonable quantity of water. Martin, B., however, adopted Lord Kingsdown's statement at the trial and concurred in it on the motion, and in *Nuttall* v. *Bracewell* (1866), L. R., 2 Exch., pp. 9, 13, it was approved by Martin, B., Channell, B., and Pollock, C.B., and it may now be taken as correct, *see Bailey & Co.* v. *Clark, Son & Morland* (1902), 1 Ch., 649; and *John White & Sons* v. *J. & M. White, ubi sup.* And *see* further, *infra*.

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"water by other proprietors, and inflicts upon them a sensible "injury."

(a) *The Ordinary Use of Water.*

Ordinary use of water.

It may be taken as settled law that every riparian proprietor has an unrestricted right to the use and consumption of the water flowing past his land for washing, drinking, and domestic purposes, and for his cattle, *ad lavandum et ad potandum*.[1] In the exercise of such ordinary rights he may exhaust the water altogether without reference to any lower proprietor.[2]

(b) *The Extraordinary Use of Water.*

Requisites of a valid extraordinary use of water.

Although it is now well established, both in England and India, that a riparian proprietor may take and use the water flowing past his land for purposes of benefit and utility to the riparian estate, such as, ordinarily, irrigation and manufacture, such user is subject to the condition that it does not inflict any sensible injury on the other riparian proprietors or interfere with the lawful use of the water by them.[3] This condition may be said, in an amplified form, to include the following restrictions: that the user must be reasonable; that its purposes must be connected with, or incident to, the riparian tenement; and that the water which is taken and used must

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[1] *Mason* v. *Hill* (1833), 5 B. & Ad., 1; 2 Nev. & Man., 747; *Embrey* v. *Owen* (1851), 6 Exch., 353; *Miner* v. *Gilmour* (1858), 12 Moo. P. C., 131; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.* (1875), L. R., 7 H. L., 697; *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* (1904), App. Cas., 301 (306); *John White & Sons* v. *J. & M. White*, *ubi sup.*; *Perumal* v. *Ramasami* (1887), I. L. R., 21 Mad., 16; *Dinkar* v. *Narayan* (1905), I. L. R., 29 Bom., 357; I. E. Act, s. 7, ill. (*j*). App. VII.

[2] *Ibid.*

[3] *Embrey* v. *Owen*, *ubi sup.*; *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S., 590; *Miner* v. *Gilmour*, *ubi sup.*: *Lord Norbury* v. *Kitchin* (1863), 3 F. & F., 292; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.*, *ubi sup.*; *First Collector of Nasik* v. *Shamji Dasrath Patil* (1878), I. L. R., 7 Bom., 209; *Perumal* v. *Ramasami*, *ubi sup.*; *Dabi Pershad Singh* v. *Joynath Singh* (1897), I. L. R., 24 Cal., 865; L. R., 24 Ind. App., 60; *Narayan* v. *Keshav* (1898), I. L. R., 23 Bom., 506; *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* *ubi sup.*; *Dinkar* v. *Narayan* (1905), I. L. R., 25 Bom., 357; *Eshan Chandra Samanta* v. *Nilmoni Singh* (1908), I. L. R., 35 Cal., 851.

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be restored substantially undiminished in volume and unchanged in character.[1]

In considering these particular requisites of a valid extraordinary user it will be convenient to consider the English and Indian law separately.

English law.

As to what is a reasonable user no general proposition is deducible from the English authorities.

Question of reasonable user.

The question can only be determined by the particular circumstances of each case, the extent of the estate, and the nature and purpose of the user.[2]

American law.

In America, a very liberal use of the water, for the purposes of irrigation and for carrying on manufactures, has been allowed.

French law.

In France, also, a riparian proprietor is allowed considerable latitude in the use of water. He may use it *en bon père de famille, à son plus grand avantage*. He may make trenches to conduct the water to irrigate his land, if he return it with no more loss than that which the irrigation caused.[3]

English law (*continued*).

In England, however, a user to that extent would not necessarily be permitted; nor would it *in every case* be deemed a lawful enjoyment of the water, if it was again returned into the stream or river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor.[4] As Baron Parke said, in *Embrey* v. *Owen*,[5] "This must depend upon the "circumstances of each case. On the one hand, it could not "be permitted that the owner of a tract of many thousand "acres of porous soil, abutting on one part of the stream, could "be permitted to irrigate them continually by canals and "drains, and so cause a serious diminution of the quantity of

Embrey v. *Owen*.

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[1] *See McCartney* v. *Londonderry and Lough Swilly Ry. Co.*, *ubi sup.* at pp. 306, 307; *Dinkar* v. *Narayan*, *ubi sup.* at p. 360.

[2] *Embrey* v. *Owen* (1851), 6 Exch., p. 372, and *see Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), I. L. R., 11 Q. B. D. at p. 168; 52 L. J. Q. B. at p. 450.

[3] *See Wood* v. *Waud* (1849), 3 Exch. at p. 781; *Embrey* v. *Owen* (1853), 6 Exch., p. 371.

[4] *See Wood* v. *Waud*; *Embrey* v. *Owen*.

[5] (1851) 6 Exch. at p. 372.

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"water, though there was no other loss to the actual stream "than that arising from the necessary absorption and evapora- "tion of the water employed for that purpose; on the other "hand, one's common sense would be shocked by supposing "that a riparian owner could not dip a watering pot into the "stream in order to water his garden, or allow his family or "cattle to drink it."

Swindon Waterworks Co. v. Wilts and Berks Canal Nav. Co

In *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*,[1] Lord Cairns, in a judgment which is now regarded as having settled and almost codified the law on the subject of riparian rights,[2] said that for the purposes of irrigation or manufacture connected with the riparian tenement there may be a use and diversion of a running stream, provided such use be reasonable, and that a reasonable use would depend on the water being restored after the object of irrigation or manufacture had been answered in a volume substantially equal to that in which it had passed before, and in some degree on the magnitude of the stream from which the abstraction was made over and above the ordinary use of water.

Applying this test to the facts in that case the House of Lords decided that the diversion of a natural stream into a permanent reservoir for the purposes of an adjacent town in no way connected with the riparian tenement was a confiscation of the rights of the lower riparian proprietors and an annihilation of that portion of the stream which was used for those purposes, and ought to be restrained.[3]

Roberts v. Gwyrfai District Council

Similarly, in *Roberts* v. *Gwyrfai District Council*,[4] the defendants had taken water from a lake for the purpose of supplying villages within their district not being part of their riparian estate, and thereby diminished the flow of water in a natural stream which was utilised for driving the plaintiff's mill. The Court of Appeal, relying on the Swindon case,

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[1] (1873) L. R., 7 H. L., 697.

[2] *See McCartney* v. *Londonderry and Lough Swilly Ry. Co.* (1904), App. Cas., 304, 305, 308.

[3] *See* also *Medway Navigation Co.* v *Earl of Romney* (1861), 9 C. B. N. S., 575; 30 L. J. Ch., 236.

[4] (1899) 1 Ch., 583; 2 Ch., 608.

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affirmed the decision of the lower court, granting an injunction perpetually restraining the defendants, their servants, etc., "from taking any water from the lake for the purpose of "supplying their district with water and from doing any "other act for that purpose whereby the flow of water in the "stream through and by the plaintiff's mill and lands should "be diminished." [1]

McCartney v. Londonderry and Lough Swilly Ry. Co.

So, too, in *McCartney* v. *Londonderry and Lough Swilly Railway Co.*,[2] where the respondents, who, for the purposes of a railway crossing, owned a small strip of land abutting on each side of a natural stream, claimed a declaration of their right as a riparian owner to insert a pipe in the stream at the crossing and carry off at least 15,000 gallons of water daily to a tank half a mile from the crossing, and there to consume the water in working their engines over many miles of their own railway and over the lines of other companies over which they had running powers, it was held that they had no such right and that the appellant was accordingly justified in stopping up the pipe. Lord Macnaghten, in observing that such proposed user was neither legitimate nor permissible, says [3]—

"There are, as it seems to me, three ways in which a "person whose lands are intersected or bounded by a running "stream may use the water to which the situation of his "property gives him access. He may use it for ordinary or "primary purposes, for domestic purposes, and the wants of "his cattle. He may use it also for some other purposes— "sometimes called extraordinary or secondary purposes— "provided those purposes are connected with or incident to "his land, and provided that certain conditions are complied "with. Then he may possibly take advantage of his position "to use the water for purposes foreign to or unconnected with "his riparian tenement. His rights in the first two cases are "not quite the same. In the third case he has no right at

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[1] The Court of Appeal suspended the operation of the injunction for a sufficient time to enable the defendants to apply to Parliament for special powers.

[2] (1904) App. Cas., 301, overruling *Earl of Sandwich* v. *Great Northern Ry. Co.* (1878), 10 Ch. D., 707.

[3] *Ibid.* at pp. 306, 307.

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"all. . . . Under what category does the proposed user of the "railway company fall? Certainly it is not the ordinary or "primary use of a flowing stream, nor is it, I think, one of "those extraordinary uses connected with or incidental to a "riparian tenement which are permissible under certain "conditions. In the ordinary or primary use of flowing water "a person dwelling on the banks of a stream is under no "restriction. In the exercise of his ordinary rights he may "exhaust the water altogether. No lower proprietor can "complain of that. In the exercise of rights extraordinary "but permissible, the limit of which has never been accurately "defined and probably is incapable of accurate definition, a "riparian owner is under considerable restrictions. The use "must be reasonable. The purposes for which the water is "taken must be connected with his tenement, and he is bound "to restore the water which he takes and uses for those "purposes substantially undiminished in volume and unaltered "in character."

On the other hand, if the abstraction of a definite and relatively small quantity of water by a riparian owner has caused no sensible injury to the complaining party the latter will not be entitled to damages on the ground of unreasonable user, even though the purpose for which the water is used on the riparian estate is not one of utility thereto.

Lord Norbury v. Kitchin.

Thus, in *Lord Norbury* v. *Kitchin*,[1] where the defendant took 8000 to 9000 gallons of water from a natural stream which sent down 330,000 gallons of water per diem and used the water so taken for the purpose of making an ornamental pond on the riparian estate, the Court decided that such user was not unreasonable and discharged the rule for a new trial.

And in England it has been suggested for consideration whether the development of trade and the use to which the water of a natural stream is put by adjoining riparian owners

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[1] (1862) 3 F. & F., 292; 9 Jur. N. S., 132.

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may not in special cases modify the usual doctrine of extraordinary user.[1]

Indian law.

The law of India does not differ from the law of England as regards the rights of riparian proprietors to the use of water in natural streams.[2]

In India, as in England, the natural right in the water is not a right of ownership or a right to the exclusive use of the water, but a right of usufruct for all reasonable and legitimate purposes, not materially interfering with an equally beneficent enjoyment of the water by other riparian proprietors.[3]

What is a reasonable or unreasonable use of the water is a question of fact to be determined by the particular circumstances of the case.[4]

Perumal v. *Ramasami Chetti*.

In *Perumal* v. *Ramasami Chetti*[5] it was decided, following the English law, that riparian proprietors are entitled to use and consume the water of the stream which their land adjoins for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the conditions (*a*) that the use is reasonable, (*b*) that it is required for their purposes as owners of the land, and (*c*) that it does not destroy or render useless or materially

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[1] *See Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), 11 Q. B. D. at p. 168; 52 L. J. Q. B. at p. 450.

[2] *Perumal* v. *Ramasami* (1887), I. L. R., 11 Mad., 16; *Debi Pershad Singh* v. *Joynath Singh* (1897), I. L. R., 24 Cal., 865 (P. C.), L. R., 24 Ind. App., 60; *Narayan* v. *Keshav* (1898), I. L. R., 23 Bom., 506; *Dinkar* v. *Narayan* (1905), I. L. R., 25 Bom. 357; *Eshan Chandra Samanta* v. *Nilmoni Singh* (1908), I. L. R., 35 Cal., 851. And *see North Shore Ry. Co.* v. *Pion* (1889), 14 App. Cas. (P. C.), 612; 59 L. J. P. C., 25; 61 L. T. (P. C.), 525. *See* also I. E. Act, s. 7, ill. (*h*), App. VII.

[3] *Sheikh Monoour Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218; *Court of Wards* v. *Rajah Leelalund Singh* (1870), 13 W. R., 48; *Baboo Chumroo Singh* v. *Mullick Khyrud Ahmed* (1872), 18 W. R., 525; *First Assistant Collector of Nasik* v. *Shamji Dasrath* (1878), 7 Bom. H. C., 209 (212); *Perumal* v. *Ramasami* (1887), I. L. R., 11 Mad., 16; *Debi Pershad Singh* v. *Joynath Singh*, *ubi sup.*; *Sangili* v. *Sundaram* (1897), I. L. R., 20 Mad., 279; *Narayan* v. *Keshav*, *ubi sup.*

[4] *Court of Wards* v. *Rajah Leelalund Singh*; *Perumal Ramasami*; *Debi Pershad Singh* v. *Joynath Singh*; *Narayan* v. *Keshav*, *ubi sup.* This is a question which a Mamlatdar has jurisdiction to decide in Bombay under Bombay Act III of 1876, s. 6, *Narayan* v. *Keshav*, *ubi sup.*

[5] (1887) J. L. R., 11 Mad., 16.

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diminish or affect the application of the water by lower riparian proprietors in the exercise of their rights.

And the recent decision of the Privy Council in *Debi Pershad Singh* v. *Joynath Singh*[1] (on appeal from the Calcutta High Court) clearly defines the limits within which in India a riparian proprietor may use the water of a natural stream flowing through or past his land for the important purpose of irrigation.

In that case the appellants, who were the plaintiffs in the first Court and proprietors of a *mehal* including three *mouzahs* through which a hill stream or *nullah* ran, claimed the right to divert the water of the stream for the purpose of irrigation, and store so much on their land as they required for such purpose, leaving the surplus, if any, for the use of the proprietors below. It was held by the Privy Council that the law gave no such right. Lord Watson in delivering judgment said[2]: "The right of a riparian proprietor to divert and use "water for the purpose of irrigation is certainly not understated "in the plaint. The right claimed by the appellants in the "first conclusion is not less broadly asserted in the body of "the plaint, and is neither more nor less than a right on the "part of an upper proprietor to dam back a river running "through his land, and to impound as much of its water as "he may find convenient for the purposes of irrigation, leaving "only the surplus, if any, for the use of the proprietors below."

"In the absence of a right acquired by contract with the "lower heritors, or by prescriptive use, the law concedes no "such right.[3] The common law right of a proprietor, in the "position of the appellants, is to take and use, for the purpose "of irrigation, so much only of the water of the stream as can "be abstracted without materially diminishing the quantity "which is allowed to descend for the use of riparian pro-"prietors below, and without impairing its quality. What

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[1] (1897) I. L. R., 24 Cal., 865; L. R., 24 Ind. App., 60.

[2] I. L. R., 24 Cal. at p. 874; L. R., 24 Ind. App. at p. 68.

[3] *See* to the same effect, *Eshan Chandra Samanta* v. *Nilmoni Singh* (1908), I. L. R., 35 Cal., 851, where the plaintiffs claimed the same unrestricted right.

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"quantity of water can be extracted and consumed, without "infringing that essential condition, must in all cases be a "question of circumstances, depending mainly upon the size "of the river or stream, and the proportion which the water "abstracted bears to its entire volume."

(3) *Rights of riparian proprietors to the purity of water.*

Similar rights of riparian owners on natural and artificial stream to purity of water.

The pollution of the water of a stream, whether natural [1] or artificial,[2] which is not supported by an easement, is an infringement of the natural right of riparian proprietors on the banks of a natural or artificial stream, respectively, to the purity of the water.[3]

The obligation imposed on upper riparian proprietors by virtue of such natural right is that they shall not so use the water of the stream as to render it unfit for any use by any lower riparian proprietor, whether such use be for ordinary or primary purposes or for the extraordinary or secondary purpose of manufacture.[4]

And it seems that the licensee of a riparian proprietor on an artificial stream may maintain an action for the pollution of water which he brings on to his premises from the artificial stream by permission of the licensor upon the principle that no man is entitled to cause polluted water to flow on to his neighbour's premises without having a special right to do so.[5]

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[1] *Wood* v. *Waud* (1849), 3 Exch., 748; 77 R. R., 809; *Hodgkinson* v. *Ennor* (1863), 4 B. & S., 229; *John Young & Co.* v. *Bankier Distillery Co.* (1890), App. Cas., 691; *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* (1904), App. Cas., 301 (307); I. E. Act, s. 7, ill. (*f*), App. VII.

[2] *Wood* v. *Waud*, *ubi sup.*; *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C., 300.

[3] Such right will exist notwithstanding that the riparian owner has no right that the flow of water in an artificial stream shall be continued, *Wood* v. *Waud*, *ubi sup.*

[4] *John Young & Co.* v. *Bankier Distillery Co.*; *McCartney* v. *Londonderry and Lough Swilly Ry. Co.*, *ubi sup.*

[5] *Whaley* v. *Laing* (1857–1858), 2 H. & N., 476; 3 H. & N., 675, 901; *Hodgkinson* v. *Ennor*, *ubi sup.* at p. 241. And *see* the same principle applied in *Ballard* v. *Tomlinson* (1885), 29 Ch. D., 115 (C. A.). But the right of action in this case is founded not on the right to use the water of the stream, but on the injury to the property of the plaintiff by reason of the polluted water coming on to his premises, *Whaley* v. *Laing*, *ubi sup.*

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(4) *Right of riparian proprietors to protect their lands from the operation of floods.*

Extent of the right.

Riparian proprietors are entitled to protect themselves against the water of a stream or river rising in flood and overflowing their lands, provided they do not thereby cause any injury to the lands and property of other riparian proprietors.[1]

This is a qualification of the rule that where there is a natural outlet for natural water no one has a right for his own purposes to diminish it.[2]

But the right of protection is apparently absolute in the case of an extraordinary or accidental flood,[3] or where by prescription or custom riparian proprietors can embank against each other.[4]

B.—Natural Rights in Natural Lakes or Ponds.

Under the Indian Easements Act,[5] riparian proprietors have the same rights in natural lakes or ponds into or out of which a natural stream flows, as in natural streams.

C.—Miscellaneous Natural Rights in Water.

It will be remembered that natural rights in water do not come into existence so long as the water does not flow in known and defined channels, whether on the surface or underground.[6]

Water confined in well or tank.

Hence, water confined in a well or tank, though the subject of ownership,[7] gives no natural right as against adjoining

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[1] *Trafford* v. *The King* (1832), 8 Bing., 204 (211); 34 R. R., 680 (685); *Att.-Genl.* v. *Earl of Lonsdale* (1868), L. R., 7 Eq., 377; *Nield* v. *London and North-Western Ry. Co.* (1874), L. R., 19 Exch., 4; *Imam Ali* v. *Poresh Mundul* (1882), I. L. R., 8 Cal., 468. And *see* *Narayana Reddi* v. *Venkata Chariar* (1900), I. L. R., 24 Mad., 202; *Venkatachalam Chettiar* v. *Zemindar of Sivaganga* (1904), I. L. R., 27 Mad., 409.

[2] *Nield* v. *London and North-Western Ry. Co.*; *Imam Ali* v. *Poresh Mundul*, *ubi sup.*

[3] *Menzies* v. *Breadalbane* (1828), 1 Bligh N. R., 414 (420); 32 R. R., 102 (108); *Venkatachalam Chettiar* v. *Zemindar of Sivaganga*, *ubi sup.* at pp. 409, 411.

[4] *Ibid.*

[5] S. 7, ill. (*h*), App. VII.

[6] *See supra*, Part III, A (1).

[7] *Race* v. *Ward* (1855), 4 E. & B., 702 24 L. J. Q. B., 153.

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owners that it shall not by anything lawfully done on their land be drawn off or that the percolation of water to such well or tank by which it is supplied shall not be interfered with.[1]

Percolations.

Similarly, a landowner who for the purpose of working his mill, or for other purposes, uses water derived from percolations has no right of action against his neighbour if the latter in the lawful enjoyment of his own property does or causes anything to be done which diminishes or stops such percolations.[2] The corollary of these propositions is that the owner of land containing underground water, which percolates by undefined channels and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it.[3]

The motive of the act of drawing the water away or stopping the percolation is immaterial, for no use of property which would be lawful if due to a proper motive can become unlawful because it is prompted by a motive which is improper or even malicious.[4]

It is the act, not the motive for the act, which must be regarded.[5]

Natural right to collect and retain surface water.

Further, every landowner has a natural right to collect and retain within the limits of his own land surface water not flowing in a defined channel.[6]

General rule subject to modification.

But the general rule that a landowner has a natural right

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[1] *Acton* v. *Blundell* (1843), 12 M. & W., 324; *see* this case fully set out in Chap. III, Part III, C.

[2] *Acton* v. *Blundell*, *ubi sup.*; *Chasemore* v. *Richards* (1859), 7 H. L. C., 349; *Ballard* v. *Tomlinson* (1885), 29 Ch. D., 115 (123); and *see Mayor of Bradford* v. *Pickles* (1895), App. Cas., 587; 64 L. J. Ch., 759, and Chap. III, Part III, C.

[3] *Chasemore* v. *Richards*; *Mayor of Bradford* v. *Pickles*, *ubi sup.*

[4] *Mayor of Bradford* v. *Pickles*, *ubi sup.*

[5] *Ibid.*

[6] *Rawstron* v. *Taylor* (1855), 11 Exch., 69; 25 L. J. Exch., 33; *Broadbent* v. *Ramsbotham* (1855), 11 Exch., 602; 25 L. J. Exch., 115; *Mayor of Bradford* v. *Pickles* (1895), App. Cas. 587; 64 L. J. Ch., 759; *Bunsee Sahoo* v. *Kali Pershad* (1870), 13 W. R., 414; *Robinson* v. *Ayya Krishnama Chariyar* (1872), 7 Mad. H. C. at p. 46; *Hari Mohun Thakur* v. *Kissen Sundari* (1884), I. L. R., 11 Cal., 52; *Perumal* v. *Ramasami* (1887), I. L. R., 11 Mad., 16, and *see* I. E. Act, s. 7, ill. (*g*), App. VII.

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to divert or appropriate within his own land, without regard to his neighbour, water percolating or flowing in undefined channels must be taken with this reservation, that, if he cannot effect such diversion or appropriation without appropriating water from a stream flowing in a defined channel, he may not do so at all.

Grand Junction Canal Co. v. Shugar.

This, as recently explained,[1] was decided in the case *The Grand Junction Canal Co.* v. *Shugar*[2] in which the facts were that the defendant acting on behalf of a local sanitary board drew off by a drain subterranean water over which the stream which supplied the plaintiff company's canal flowed, and in consequence of such withdrawal of support, the surface stream sank to a lower level and the supply of water to the canal was diminished.

Upon these facts Lord Hatherley, L.C., said:[3] "As far as "regards the support of the water, all one can say is this: "I do not think *Chasemore* v. *Richards*, or any other case, has "decided more than this, that you have a right to all the "water which you can draw from the different sources which "may percolate underground; but that has no bearing at all "on what you may do with regard to water which is in a "defined channel, and which you are not to touch. If you "cannot get at the underground water without touching the "water in a defined surface channel, you cannot get at it at "all. You are not by your operations, or by any act of yours, "to diminish the water which runs in this defined channel, "because that is not only for yourself, but for your neighbours "also, who have a clear right to use it, and have it come to "them unimpaired in quality, and undiminished in quantity."

English v. Metropolitan Water Board.

In the recent case of *English* v. *Metropolitan Water Board*,[4] these words were not given the full and literal meaning apparently assignable to them, but the decision was, by reference to the particular facts, explained as laying down

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[1] *English* v. *Metropolitan Water Board* (1907), 1 K. B., 588, *see* further, *infra*.

[2] (1871) L. R., 6 Ch. App., 483.

[3] *Ibid.* at p. 487.

[4] *Ubi sup.*

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that if a diversion or appropriation of underground percolations results in the abstraction and appropriation of water from a surface stream, such first-mentioned diversion or appropriation will be wrongful by reason of the resulting appropriation.

It is, therefore, important to note that the essence of the wrong lies in the *appropriation* of the water of the surface stream; the mere resulting abstraction or diversion thereof without appropriation would not be actionable, and in such case the right of diverting or appropriating the underground water would remain intact.[1]

Natural right of drainage.

Not only has every landowner a natural right to collect and retain within the limits of his own land surface water not flowing in a defined channel,[2] but he has also the right to draw it off on to his neighbour's lower lands[3] or put it to whatever use he pleases, agricultural or otherwise.[4]

Right of artificial discharge only acquired by easement.

But though there is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of nature and in undefined channels, there is no obligation upon an adjoining landowner to submit to an artificial discharge of water from his neighbour's lands, unless, as has been seen, he is bound by an easement to do so.[5]

Natural right to defend land from injury by sea.

It is the natural right of every landowner to defend his land from injury by the sea whatever result the exercise of such right may have on his neighbours.[6]

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[1] It is apprehended, however, that the abstraction and appropriation of the surface stream in order to give a cause of action must be substantial, *see infra*, F.

[2] *See supra*.

[3] *Smith* v. *Kenrick* (1849), 7 C. B. at p. 566; *Rawstron* v. *Taylor* (1855), 11 Exch., 369; 25 L. J. Exch., 33; *Broadbent* v. *Ramsbotham* (1856), 11 Exch., 602; 25 L. J. Exch., 115; *Chasemore* v. *Richards* (1859), 7 H. L. C. at pp. 371, 375, 376; *Robinson* v. *Ayya Kristnama* (1872), 7 Mad. H. C. at p. 46; *Kopil Pooree* v. *Manick Sahoo* (1873), 20 W. R., 287; *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335; *Imam Ali* v. *Poresh Mundul* (1882), I. L. R., 8 Cal., 468; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas., 691; and *see* the I. E. Act, s. 7, ill. (*i*), App. VII.

[4] *Rawstron* v. *Taylor*; *Broadbent* v. *Ramsbotham*; *Chasemore* v. *Richards*; *Robinson* v. *Ayya Kristnama*.

[5] *See Arkwright* v. *Gell* (1839), 5 M. & W., 203; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas., 691; and Chap. III, Part III, D.

[6] *Rex* v. *The Pagham Commissioners* (1828), 8 B. & C., 355; 32 R. R., 406; *Rex* v. *The Bognor Commissioners* (1828),

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Rex v. *Commissioners of Sewers for Pagham.*

This rule was established in the case of *Rex* v. *Commissioners of Sewers for Pagham*.[1] In that case the Commissioners acting *bonâ fide* for the benefit of the objects for which they were appointed caused certain defences to be erected against the inroads of the sea with the result that it flowed with greater violence against, and injured, the lands of the adjoining proprietor. It was held that they could not be compelled to compensate the adjoining proprietor or erect new works for his protection, for all owners of land exposed to the inroads of the sea, or Commissioners acting on their behalf, have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others.

Thus, in this respect, there is a difference between the rights of landowners on the sea-coast and riparian owners in the case of ordinary floods, the latter, as will be remembered, being restricted in their right of self-protection to such operations as will not cause injury to other riparian owners.[2]

That this unqualified right has been given to sea-coast proprietors is due to the reason that the sea is considered a common enemy, against which all proprietors of lands on the seashore have a common right of defence. Thus, if one proprietor is injured or likely to be injured by the means of protection adopted by another proprietor, his remedy is in his own hands, and he can, if he chooses, adopt similar means of protection against the inroads of the sea.[3]

Natural right to purity of water in undefined streams.

It has been seen that there is a natural right to the purity of water in natural and artificial streams[4]; but further than this, every landowner has a natural right that water coming to his land, whether by undefined surface streams or by percolations through that soil, shall not be polluted.[5]

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6 L. J. K. B., 338; *Venkatachalam Chettiar* v. *Zemindar of Sivaganga* (1904), I. L. R., 27 Mad., 409 (411).

[1] *Ubi sup.*

[2] *Supra*, Part III, A (1) and (4).

[3] *Rex* v. *The Pagham Commissioners*; *Rex* v. *The Bognor Commissioners*; *Att.-Genl.* v. *Earl of Lonsdale.*

[4] *Supra*, Part III, A (3).

[5] *Ballard* v. *Tomlinson* (1885), 29 Ch. D., 115.

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D.—Alienation of Natural Rights in Water.

Effect of, as regards the alienee.

It was a matter of doubt, at one time, as to what is the true position of grantee, or licensee, of a riparian owner who, whilst retaining his riparian property, grants or licenses the use of the water flowing past his land.

Whaley v. *Laing*.

In *Whaley* v. *Laing*,[1] the decision turned principally upon the pleadings, but the judges of the Exchequer Chamber expressed grave doubts[2] whether the licensee of a riparian proprietor could maintain an action for the pollution or diversion of the water founded on a right to the water.

And subsequent decisions have clearly established that an alienation by a riparian proprietor of his natural rights in water as apart from his riparian property is valid only as between the grantor and the grantee, and gives the latter no right of action as against other persons for an infringement of them.[3]

If such an alienation gives rise to no liability on the part of third persons to the grantee for any interference with the accustomed flow of water, it clearly confers upon him no rights to the use of the water, as against riparian proprietors other than the grantor; thus, any user by the grantee which sensibly affects the flow of water to the lands of such other proprietors is wrongful, and will be restrained.[4]

And even though the use of the water by the grantee may be such as can never grow into a prescriptive right,[5] it would seem that since the recent decision in the House of Lords the alienation by a riparian proprietor of his natural rights in a running stream can be challenged on the further ground that it gives rise to a use of the water for purposes which are not connected with or incidental to the riparian estate.[6]

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[1] (1857) 2 H. & N., 476; 3 H. & N., 675, 901.

[2] *See* 3 H. & N., 675.

[3] *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C., 300; *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), 11 Q. B. D., 155.

[4] *Ormerod* v. *Todmorden Joint Stock Mill Co.*, *ubi sup.*

[5] This was the ground of the decision in *Kensit* v. *Great Eastern Ry. Co.* (1884), 27 Ch. D., 122, as is explained in *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* (1904), App. Cas., 301 (313).

[6] *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* (1904), App. Cas., 301.

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The Stockport Waterworks Co. v. *Potter*.

In *The Stockport Waterworks Co.* v. *Potter* the law is clearly stated by Pollock, C.B., as follows[1]:—

"There seems to be no authority for contending that a "riparian proprietor can keep the land abutting on the river, "the possession of which gives him his water rights, and at "the same time transfer those rights or any of them, and thus "create a right in gross by assigning a portion of his rights "appurtenant."

"It seems to us clear that the rights which a riparian "proprietor has with respect to the water are entirely derived "from his possession of the land abutting on the river."

"If he grants away any portion of his land so abutting, "then the grantee becomes a riparian proprietor and has "similar rights. But if he grants away a portion of his "estate not abutting on the river, then clearly the grantee of "the land would have no water rights by virtue merely of his "occupation. Can he have them by express grant? It seems "to us that the true answer to this is that he can have them "against the grantor, but not as to sue other persons in his "own name for an infringement of them. The case of *Hill* v. "*Tupper*,[2] recently decided in this Court, is an authority for the "proposition that a person cannot create by grant new rights "of property so as to give the grantee a right of suing in his "own name for an interruption of the right by a third party."

Ormerod v. *Todmorden Joint Stock Mill Co.*

In *Ormerod* v. *Todmorden Joint Stock Mill Co.*, Bowen, L.J., says[3]: "Whether the original right of a riparian pro- "prietor to the flow of water is in virtue of his ownership of "land upon the bank or his presumed title to the bed of the "river *usque ad medium filum*,[4] the only legitimate user by "him of the water, other than such rights as he may have "acquired by prescription, is for purposes connected with his

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[1] *Ubi sup.* at p. 326.

[2] (1863) 2 H. & C., 121.

[3] *Ubi sup.* at p. 172.

[4] But the latter view has been rejected by the House of Lords in *Lyon* v. *Fishmongers Co.* (1876), 1 App. Cas., 662; 46 L. J. Ch., 68; 35 L. T., 569; 25 W. R., 165, and by the Privy Council in *North Shore Ry. Co.* v. *Pion* (1889), 41 App. Cas. (P. C)., 612; 59 L. J. P. C., 25; 61 L. T. (P. C.), 525.

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"ordinary occupation of the land upon the bank. The right "of a riparian owner to the flow of water may, in this "respect, possibly be compared to a right of common appur- "tenant for cattle levant and couchant upon land; this right "cannot be aliened from the land; whereas a right of common "appurtenant for a number of beasts certain may be assigned."

E.—Disturbance of Natural Rights in Water and Remedies therefor.

In India, especially, the beneficial enjoyment of natural rights in water is so important to the agricultural and manufacturing communities that it is thought this part of the present chapter would scarcely be complete without special reference to the principles upon which an actionable disturbance of these rights proceeds, and to the remedies for such disturbance.

Definition of actionable disturbance of natural rights in water.

An actionable disturbance of natural rights in water may be defined as—

(1) Any act, or series of acts, which in the exercise, or assumed exercise, of an authorised or permissible user materially or sensibly diverts the water from its ordinary or accustomed course, or materially or sensibly diminishes it in quantity.[1]

(2) Any act, or series of acts, committed in the exercise of an unauthorised or unpermissible user, such as a diversion or abstraction of the water for purposes unconnected with the riparian tenement or an alteration of the temperature, or a pollution, of the water, whether by a riparian owner or his grantee, and where such act, or series of acts, are not founded on an easement.[2]

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[1] *See* in this connection the cases cited *supra*, Part III, A (1), under "Relative "rights and obligations of riparian pro- "prietors on natural private streams." This definition is, of course, not intended to refer to the abstraction of water for ordinary or primary purposes whereby a riparian owner may, if he choose, exhaust the water of the stream altogether," *see supra*, Part III, A (2) (*a*).

[2] *See* the cases referred to in the last note, and *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C., 300.

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Two grounds upon which injured party entitled to relief.

In common with these two modes of disturbance there are two grounds upon which the party injured is entitled to the intervention of the Court. These grounds are—

(1) Any invasion of the right causing actual damage.[1]

(2) Any invasion of the right calculated to found a claim which may ripen into an adverse right.[2]

Where neither *damnum* nor *injuria* no action lies.

But where there is neither *damnum* nor *injuria* no action will lie.[3]

Thus, where a riparian proprietor sued for the removal of an encroachment on the soil of a stream which was vested in Government, and proved neither a natural right nor an easement to have the water flow in its accustomed manner, nor any sensible alteration of the flow of the water, it was held the suit would not lie.[4]

Extent of relief by injunction.

Stopping the flow of water by putting an embankment across it,[5] diverting the water and impounding it in such a way as to cause its entire, or almost entire, abstraction,[6] are acts of disturbance against which the Court will relieve by injunction.

But the injured riparian proprietor is only entitled to the removal of so much of the obstruction as actually interferes with his natural rights.[7]

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[1] *Embrey* v. *Owen* (1851), 6 Exch., 353; *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S., 590; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.* (1875), L. R., 7 H. L., 697; *Kensit* v. *Great Eastern Ry. Co.* (1884), 27 Ch. D. at p. 130; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas. at p. 698; *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335.

[2] In such a case absence of special damage to the plaintiff is no defence to his claim for relief, for such invasion imports damage, and the right to relief is irrespective of any use of the water or desire to use it on the part of the plaintiff, *see* the cases cited in the last note and also *Wood* v. *Waud* (1849), 3 Exch. at p. 772; *Bickett* v. *Morris* (1866), L. R., 1 H. L. Sc., 47; *Harrop* v. *Hirst* (1868), L. R., 4 Exch., 43; *Kali Kissen Tagore* v. *Jodoo Lall Mullick* (1879), 5 C. L. R. (P. C.), 97; L. R., 6 Ind. App., 190, and *supra*, Part I, under "Principles applicable to the disturbance of Natural Rights."

[3] *Kali Kissen Tagore* v. *Jadoo Lall Mullick*, *ubi sup.*

[4] *Ibid.*

[5] *Sheikh Monoour Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218; *Baboo Chumroo Singh* v. *Mullick Khyrut Ahmed* (1873), 18 W. R., 525.

[6] *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.* (1875), L. R., 7 H. L., 697; *Debi Pershad Singh* v. *Joynath Singh* (1899), I. L. R., 24 Cal. (P. C.), 865; L. R., 24 Ind. App., 60; *Narayan* v. *Keshae* (1898), I. L. R., 23 Bom. 506.

[7] *Court of Wards* v. *Raja Leelanund Singh* (1870), 13 W. R., 48.

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Thus where, as sometimes occurs in India, a bund is erected on another man's land which has the effect of causing an unreasonable diversion or abstraction of water, the riparian proprietor who complains of such infringement of his natural right is entitled to the removal of only so much of the bund as actually causes the interference.[1]

Recurring cause of action.

So long as the obstruction continues the cause of action is renewed from day to day, and it is in the discretion of the Court to grant an injunction to avoid a multiplicity of suits.[2]

Pleadings.

In a plaint for disturbance of natural rights in water it is sufficient to state that the plaintiff was (and is) possessed of land and was (and is) entitled as (owner and) occupier of the said land to [here state the particular right claimed]. If the right claimed is a riparian right it should be stated that the plaintiff is entitled by his riparian rights as (owner and) occupier of the said land to the particular right to be stated.[3]

Part IV.—Natural Right of Support.

Nature and origin of right.

The natural right of support exists in the case of support of land in its natural state by adjacent or subjacent land in its natural state.

It is a right of property, an attribute of nature given for the common benefit of mankind, and must necessarily have existed from the beginning.[4] Unless each owner is entitled, as of natural right, to enjoy unmolested his land with this and other attributes given to it by nature, he has not the free and absolute use of it.[5] Such a right "stands on natural "justice, and is essential to the protection and enjoyment of "property in the soil."[6]

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[1] *Ibid.*

[2] *Court of Wards* v. *Raja Leelalund Singh*, *ubi sup.*; *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335; *Maharani Rajroop Koer* v. *Syed Abdul Hossein* (1880), I. L. R., 6 Cal., 394; 7 C. L. R., 529; 7 Ind. App., 240; Specific Relief Act, s. 54 (*e*), App. V, and *see* the cases cited under the general proposition in Part I.

[3] Bullen and Leake, Precedents of Pleading, 6th Ed., 537.

[4] *Angus* v. *Dalton* (1878), 4 Q. B. D., at pp. 191, 192.

[5] *Ibid.*

[6] *Humphries* v. *Brogden* (1850), 12 Q. B. at p. 744; 20 L. J. Q. B. at p. 12.

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Dalton v. *Angus.*

The nature and origin of the right is explained by Field, J., in *Dalton* v. *Angus*,[1] where he says—

"So soon as the surface of the land becomes divided, either "vertically or horizontally, into separate and exclusive tene- "ments, one of the first and clearest principles applicable to each "separate holding is, that the owner has the right given to "him by implication of law to use his property as best he likes, "provided that he does not by such user injure the rights of "his neighbour. If neither he nor his neighbour have built "on or dealt with their respective portions, and the latter are "in their natural state and condition, it is clear that each owner "has as against the other a right to have his soil supported by "the soil of his neighbour, whether adjacent or below, and any "act done by one which destroys that support so that the land "of the other falls is an actionable wrong, and that is so, "although the act complained of is not done by him maliciously, "but simply in the exercise of his own right to use his own "property. Although, therefore, either of them may dig in "his own soil as deep and as near to his own boundary or to "the surface as he chooses, this right is subject to one limita- "tion from the very first, viz. that he cannot dig so deep and "so near as to cause the neighbour's land to sink, unless he "substitute some other efficient support."[2]

"This limitation, however, upon his right is accompanied "by a like limitation of his neighbour's right, so that the "advantage and burthen are mutual in quality, although they "may vary in degree."

"It is clear that these rights and burthens come into "existence by implication of law at the very moment of "severance."

"They are unquestionably known as natural rights and "require no age to ripen them."

Dalton v. *Angus*[3] and numerous other authorities[4] establish

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[1] (1881) 6 App. Cas. at p. 752.

[2] *See* also *Wilde* v. *Ministerley*, 2 Roll. Abr., 564, Trespass I, pl. I; *Humphries* v. *Brogden* (1850), 12 Q. B., 739; 20 L. J. Q. B., 10; *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348.

[3] (1881) 6 App. Cas., 740.

[4] *Harris* v. *Ryding* (1839), 5 M. & W.,

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that the right of support for land by land is a natural right, a right of property passing with the land, and a right which gives rise to a corresponding obligation on every landowner that he shall not work on his own land in such a manner as to cause his neighbour's land to slip, fall in, or subside, and thereby cause him damage.[1]

Withdrawal of support in building and mining operations.

In this latter respect the natural right of support and the easement of support are similar in character.[2] The damage must be appreciable in order to maintain an action for the infringement of the right.[3]

Cases of withdrawal of support occur ordinarily in two classes of operations, namely, in building [4] and mining [5] operations. In the former, a wall usually takes the place of the support previously given to the adjoining land by the natural soil. But if, owing to the inefficiency of the new support or to the failure to substitute any new support for the natural support, the adjoining land subsides, and damage is

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60; *Humphries* v. *Brogden* (1850), 12 Q. B., 739; 20 L. J. Q. B., 10; *Rogers* v. *Taylor* (1858), 2 H. & N., 828; 27 L. J. Exch., 173; *Hunt* v. *Peake* (1860), 1 Johns., 705; *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; 30 L. J. Q. B., 49; *Bonomi* v. *Backhouse* (1859), E. B. & E., 646 (655); *Backhouse* v. *Bonomi* (1861), 9 H. L. C., 503; *Corporation of Birmingham* v. *Allen* (1877), 6 Ch. D., 284. And *see Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas., 127; *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson, Ltd.* (1908), App. Cas., 27.

[1] The natural right also exists where the support is afforded by wet sand or running silt, *Jordeson* v. *Sutton, etc., Gas Co.* (1899), 2 Ch., 217, or by a natural stratum of asphaltum or pitch, *Trinidad Asphalt Co.* v. *Ambard* (1899), App. Cas., 594.

[2] *Bonomi* v. *Backhouse, ubi sup.*

[3] *Smith* v. *Thackerah* (1866), L. R., 1 C. P., 564.

[4] *See Bonomi* v. *Backhouse, ubi sup.*; *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 752.

[5] "The rights of surface and mineral "owners at common law are well settled. "Every landowner has, as an incident of "his property in land, a right to its lateral "support by the adjacent land to an ex- "tent sufficient to support it in its natural "state. Where the surface and the "minerals have been severed, whether by "grant of surface reserving minerals or "by grant of minerals reserving surface, "the surface owner has a right to sup- "port both lateral and vertical unless "a power of working the minerals so "as to let down the surface is granted or "reserved, and where there is nothing to "shew how or when the surface and "minerals were severed, the same right "to support exists," *per* Farwell, J., in *Manchester Corporation* v. *New Moss Colliery, Co., Ltd.* (1906), 1 Ch. at p. 291. As to easements to let down the surface, *see* further, *supra*, Chap. III, Part IV, B.

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thereby caused to the adjoining owner, a right of action will accrue.[1]

So in the case of mining operations if the owner of the minerals in the course of his excavations withdraws the natural support from his neighbour's land and substitutes either no support at all or a support which is inefficient, he is liable to his neighbour for the damage he thereby causes him, and neither the care and skill with which the operations may have been carried out, nor the unstable nature of the soil propped up, nor the difficulty of propping it up will afford any defence to the action.[2]

Cause of action, how constituted.

And as in the case of an easement of support, so, too, in the case of the natural right, it is not the excavation *per se* which is the wrongful act, but the damage which actually results from the excavation,[3] and the foundation of this rule is, that the law favours the exercise of dominion by every one on his own land and his use of it for the most beneficial purpose to himself, and accordingly declares that before a man can be made liable for an act done in his own land, there must be actual damage caused to his neighbour.[4]

If it were otherwise, and a man were entitled to sue for prospective damage, the question in each case would be the merely speculative one as to whether any damage was likely to arise, depending for its answer upon the evidence of experts whose predictions might subsequently be contradicted by the actual event.[5]

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[1] *See* the cases cited in note 4, p. 294, *supra*; *Dalton* v. *Angus* (1881), 6 App. Cas., at p. 752; Kerr on Injunctions, 4th Ed., p. 163.

[2] *Ibid.* As to the form of order restraining the working, removing, or injuring pillars or walls of coal left for the support of roofs in collieries, *see Mostyn* v. *Lancaster* (1883), 23 Ch. D., 583 (625). But the owner of minerals is not liable for damage to his neighbour which, though occurring during the time of the former's possession, is caused by the act of his predecessor in title, *Greenwell* v. *Low Beechburn Coal Co.* (1897), 2 Q. B., 165; *Hall* v. *Duke of Norfolk* (1900), 2 Ch., 493.

[3] *Humphries* v. *Brogden*; *Bonomi* v. *Backhouse*; *Backhouse* v. *Bonomi*; *Wakefield* v. *Duke of Buccleugh* (1866), L. R., 4 Eq., 613; 36 L. J. Ch., 763; *Hext* v. *Gill* (1872), L. R., 7 Ch. App., 699; *Davis* v. *Treharne* (1881), 6 App. Cas., 460; *Dixon* v. *White* (1883), 8 App. Cas., 833; *Darley Main Colliery Co.* v. *Mitchell*, *ubi sup.*; *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson, Ltd.*, *ubi sup.*

[4] *See per* Willes, J., in *Bonomi* v. *Backhouse*, *ubi sup.*

[5] *Ibid.*

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Further, vexatious and oppressive actions might be brought on the one hand; and, on the other, an unjust immunity obtained for secret workings of the most mischievous character, but the result of which would not appear within the period of limitation, a state of things which might well arise if limitation were to run from the time the damage was likely to occur instead of from the time it actually occurred.[1]

West Leigh Colliery Co., Ltd. v. *Tunnicliffe & Hampson, Ltd.*

In *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson, Ltd.*,[2] the most recent decision on the subject, Lord Macnaghten says[3]: "It is undoubted law that a surface owner has "no cause of action against the owner of a subjacent stratum "who removes every atom of the mineral contained in that "stratum unless and until actual damage results from the "removal."

Depreciation in market value from risk of future subsidence, not actionable.

And in the same case it was laid down that in assessing the damages, which an owner of minerals is liable to pay for injury caused to the surface owner by the subsidence of his land or buildings owing to the working of the minerals under or adjoining his property, the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account.

Quia timet injunction.

But though a suit for damages will not lie where a subsidence of the plaintiff's land is merely apprehended and has not actually occurred, it seems that if a sufficiently strong and clear case be made out, the Court will interfere by injunction to prevent irreparable damage.[4]

Nature and extent of land to and by which support is given.

The land, for the benefit of which the natural right exists, must be land in a natural condition, and the support must be naturally rendered.[5]

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[1] *Ibid.*

[2] (1908) App. Cas., 27.

[3] *Ibid.* at p. 29. Each successive subsidence constitutes a fresh cause of action and entitles the surface owner to a fresh claim for damages, whether such subsidences are the result of the same excavation or of different excavations, *Ibid.*; and *see Darley Main Colliery Co., Ltd.* v. *Mitchell* (1886), 11 App. Cas., 127; *Crumbie* v. *Wallsend Local Board* (1891), 1 Q. B., 503.

[4] *Corporation of Birmingham* v. *Allen* (1877), L. R., 6 Ch. D., 284 (287).

[5] *Humphries* v. *Brogden* (1848), 12 Q. B., 739; 20 L. J. Q. B., 10; *Bonomi* v. *Backhouse* (1859), E. B. & E., 655; 9 H. L. C., 502; *Corporation of Birmingham* v. *Allen* (1871), L. R., 6 Ch. D., 284; 46 L. J. Ch., 673. The nature of the

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The common law obligation of support extends to any land upon which, in its natural condition, other land depends, directly or indirectly, for its support, but the supporting land is not liable, otherwise than by grant or prescription, to afford an increased measure of support caused by the artificial pressure of buildings erected on the supported land, or by the diminution of its self-supporting power, or by the unpreventible excavation of intermediate land.[1]

But though there is no natural right to support for buildings by land, appreciable damage done to land on which they rest is actionable if the damage to the land would have occurred supposing the buildings had not been there.[2]

It would, of course, be otherwise if without the artificial pressure of buildings no appreciable damage would have ensued.[3]

Indian Easements Act, s. 7, ill. (*e*).

The Indian Easements Act, in section 7, illustration (*e*), and the explanation thereto, reproduces the English law in the following terms:—

"The right of every owner of land that such land in its "natural condition shall have the support naturally rendered "by the subjacent and adjacent soil of another person."[4]

The explanation to the illustration is—

"Land is in its natural condition when it is not excavated,[5]

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strata composing the land is, and must be, immaterial, for it is obviously impossible for the Court to define, in this respect, the physical limits of the right, *see Trinidad Asphalte Co.* v. *Ambard* (1899), App. Cas., 594 (602), citing *Humphries* v. *Brogden*, *ubi sup.* But the support itself must be "that which will protect the "surface from subsidence and keep it "securely at its ancient and natural "level," *per* Lord Campbell in *Humphries* v. *Brogden*, *ubi sup.* at p. 745.

[1] *Partridge* v. *Scott* (1838), 3 M. & W., 220; *Brown* v. *Robins* (1859), 4 H. & N., 186; 28 L. J. Exch., 250; *Backhouse* v. *Bonomi* (1861), 9 H. L. C., 503; *Corporation of Birmingham* v. *Allen* (1877), 6 Ch. D., 284. In the last-cited case it was held that the support to which an owner of land is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural undisturbed condition is sufficient to afford the requisite support.

[2] *Browne* v. *Robins* (1859), 28 L. J. Exch., 250; *Stroyan* v. *Knowles* (1861), 6 H. & N., 454; 30 L. J. Exch., 102.

[3] *Smith* v. *Thackerah* (1866), L. R., 1 C. P., 564.

[4] *Humphries* v. *Brogden*; *Bonomi* v. *Backhouse*; *Corporation of Birmingham* v. *Allen*, *ubi sup.*

[5] *See Partridge* v. *Scott*: *Corporation of Birmingham* v. *Allen*.

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"and is not subjected to artificial pressure,[1] and 'the subjacent "'and adjacent soil' mentioned in this illustration means such "soil only as in its natural condition would support the "dominant heritage in its natural condition."[2]

Covenant having effect of release of the natural right.

Though a natural right of support cannot be extinguished by a release, a covenant binding the owner of the surface land may operate so as to destroy the right, as where on a separation of surface land from the mines beneath, the person taking the surface land enters into a covenant in which he states that he is ready to accept the surface land subject to any inconvenience or incumbrance which may arise from working the mines.[3]

Common law rights of support when superseded.

When surface land is taken for the purpose of a public undertaking under a special Act, whether under power of compulsory purchase or under a power to purchase by agreement, such special Act may, but does not necessarily, exclude the common land right to support from adjacent and subjacent minerals, and may vary in its application according as the minerals are subjacent minerals reserved by an owner who sells a surface, or minerals adjacent to the land of some neighbouring owner.[4]

Thus, where under conditions provided for by the special Act the mineowner becomes remitted to his former rights and accordingly entitled to work *subjacent* minerals without liability for the withdrawal of support if the mines are not worked in an unusual manner, such immunity does not necessarily extend to the working of the same minerals so as to deprive the undertakers of the same common law right of support in respect of other *adjacent* land and minerals which had been enjoyed by the former owner thereof and have passed to the undertakers by purchase.[5]

Pleadings.

Since the right of support for land by land is not an

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[1] *E.g.* by buildings. For such cases *see* Chap. III, Part IV, A (1), (*b*).

[2] *Corporation of Birmingham* v. *Allen*, *ubi sup.*

[3] *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348.

[4] *Manchester Corporation* v. *New Moss Colliery Co., Ltd.* (1906), 2 Ch., 564; (1908) App. Cas., 117.

[5] *Ibid.*

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easement, but a right of property, *ex jure naturæ*, a plaint for the disturbance of the natural right need contain no express allegation of the right. It is enough to state the facts from which a right or a duty arises.[1]

No natural right of support to land by subjacent water.

There is no natural, or common law, right of support for surface land by subjacent water. The question is one of some complexity, and involves important considerations, and before it can be satisfactorily answered the conflicting rights of neighbouring landowners must be reconciled; and it is difficult to say which ought to give way to the other. On the one hand, there is the landowner who, by virtue of the maxim, "*Cujus est solum ejus est usque ad inferos*," claims the right to do what he pleases on his land; and on the other, there is his neighbour who, relying on the maxim, "*Sic utere tuo ut alienum non lædas*," claims that the support which nature has provided for his land shall not be interfered with.

Popplewell v. *Hodkinson*.

The question was considered in *Popplewell* v. *Hodkinson*.[2] In that case the plaintiff's cottages, which stood on marshy land, had been let down and injured owing to the subjacent water having been drawn off by extensive excavations in similar land of the defendant's. The land would have subsided even if no buildings had been erected on it.

It was decided that, irrespective of grant,[3] there is no natural right of support to land from underground water, and the action failed.

In his judgment, Cockburn, C.J., said[4]: "Although there is "no doubt that a man has no right to withdraw from his "neighbour the support of adjacent soil, there is nothing at "common law to prevent his draining that soil if, for any "reason, it becomes necessary or convenient for him to do "so."

For many years this decision was accepted without question

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[1] *Humphries* v. *Brogden* (1850), 12 Q. B., 739; 20 L. J. Q. B., 10; *Hext* v. *Gill* (1872), L. R., 7 Ch. App., 699; *Davis* v. *Treharne* (1881), 6 App. Cas., 460; *Dixon* v. *White* (1883), 8 App. Cas., 833.

[2] (1869) L. R., 4 Ex., 248.

[3] As to an easement in such a case, *see supra*, Chap. III, Part IV, A (2), (*b*).

[4] *Ubi sup.* at p. 251

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as an authority for the proposition that under no circumstances could there be such a right of support.

But recently it has been questioned [1] whether the decision can be taken as finally laying down any such unqualified rule, or as doing anything more than imposing a limitation of the right which would follow from the doctrine of *sic utere tuo ut alienum non lædas* being driven to its extreme logical conclusion.

But notwithstanding these and other comments on it,[2] *Popplewell* v. *Hodkinson* has never been dissented from and, accordingly, must still be regarded as a clear authority that there is no obligation at common law so to deal with land as not to draw off subjacent water supporting a neighbour's surface land.[3]

And this conclusion seems consistent with the English authorities and right in principle.[4]

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[1] *Jordeson* v. *Sutton, etc., Gas Co.* (1899), 2 Ch., 217, 239, 242, 243.

[2] *See per* Jessel, M.R., in *Rigby* v. *Bennett* (1882), 21 Ch. D., 559 (563), (564).

[3] *See per* Vaughan Williams, L.J., in *Jordeson* v. *Sutton, etc., Gas Co., ubi sup.* at p. 247, and *English* v. *Metropolitan Water Board* (1907), 1 K. B., 588. But the decision in *Popplewell* v. *Hodkinson* is not applicable to the case of support by wet sand or running silt, *Jordeson* v. *Sutton, etc., Gas Co., ubi sup.*, or by a natural stratum of asphaltum or pitch, *Trinidad Asphalt Co.* v. *Ambard* (1899), A. C., 594.

[4] *Jordeson* v. *Sutton, etc., Gas Co., ubi sup.* at p. 248.

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Part I.—Generally.

In previous chapters some of the various methods whereby easements come into existence have been incidentally referred to.

In this chapter it is proposed to discuss certain particular methods of acquisitions, prefacing such discussion with some observations of a general character.

Theoretically, all methods of acquisition lie in grant, whether express, or implied from the acts of parties or surrounding circumstances, or presumed from long user, or by prescription. Theoretically all easements lie in grant.

Creation of the rights themselves (as where *A* and *B* being adjoining landowners, *A* grants *B* a right of way over his land) or the transfer of the dominant tenement without the use of restrictive words, illustrates some of the ordinary methods of acquisition. Creation. Transfer.

But, though an easement can thus be created by grant, it is in law impossible for the grantor of an intended servient tenement to create an easement in his own favour by mere reservation, though if the deed is executed by both parties, the reservation will be held to operate as a grant of the easement to the grantor of the land,[1] as Tindal, C.J., said, in *Durham and* Reservation.

[1] But in equity it is not essential that a deed which merely carries into effect a previous agreement should be executed by both parties in order to be binding on both of them, *Walsh* v. *Lonsdale* (1882), 21 Ch. D., 9. And *see May* v. *Belleville* (1905), 2 Ch., 605.

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Sunderland Railway Co. v. *Walker*[1]: "A right of way cannot, "in strictness, be made the subject either of exception or "reservation. It is neither the parcel of the thing granted, "nor is it issuing out of the thing granted, the former being "essential to an exception, and the latter to a reservation. A "right of way *reserved* (using that word in a somewhat popular "sense) to a lessor, as in the present case, is, in strictness of "law, an easement newly created by way of grant from the "grantee or lessee, in the same manner as a right of sporting "or fishing."

Under Indian Easements Act.

Any one having an interest in land may create an easement over it in the circumstances and to the extent in which, and to which, he may convey such interest.[2]

Under Transfer of Property Act.

Section 8 of the Transfer of Property Act, IV of 1882, provides that unless a different intention is expressed or necessarily implied,[3] a transfer of property passes forthwith to the transferee, all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof, and that such incidents include, where the property is land or a house, the easements annexed thereto.

This provision is limited to transfers *inter vivos*.

Comments in *Wutzler* v. *Sharpe*.

Section 8 of Act IV of 1882 and section 5 of Act V of 1882 have been commented upon as follows by the Allahabad High Court in the case of *Wutzler* v. *Sharpe*[4]: "Under section 8 of "Act IV of 1882 the easements which may pass on a transfer "of land or a house are the 'easements annexed thereto.'"

"What meaning the Indian Legislature intended to express "by the use of the word 'annexed' in section 8 of the Act, it "is impossible to ascertain."

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[1] (1842) 2 Q. B., 940, 967; 57 R. R., 842.

[2] *See* I. E. Act, s. 8, App. VII. But it is clear that a power to sell land does not give power to grant an easement over it, *In re Barrow-in-Furness and Rawlinson's Contract* (1903), 1 Ch., 339.

[3] As to the effect of these words, *see Beddington* v. *Attlee* (1887), 35 Ch. D., 317 (331); *Birmingham, etc., Co.* v. *Ross* (1888), 38 Ch. D., 295 (308); *Broomfield* v. *Williams* (1897), 1 Ch., 602, which refer to the corresponding words used in s. 6 of the Conveyancing and Law of Property Act, 1881. As to the use of restrictive words, *see Re Peck* v. *London School Board* (1893), 2 Ch., 315; *Re Hughes* v. *Ashley* (1900), 2 Ch., 595.

[4] (1893) I. L. R., 15 All., 270.

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"It is not in this connection at least an ordinary term of "law, and Act IV of 1882 does not define it."

"It may be assumed from Dr. Whitley Stokes' introduction "to Act IV of 1882, in his edition of the Anglo-Indian Codes, "that the statute 44 and 45 Vict., Chap. 41,[1] was before the "Legislature in India, or its advisers, when Act IV of 1882 "was passed; yet the Indian Legislature for some reason did "not think it advisable to use in section 8 of Act IV of 1882, "the plain language of section 6 of 44 and 45 Vict., Chap. 41. "Possibly it was not intended to extend to India the broad "principles of what appear to be justice, equity, and good "conscience to be found in section 6 of 44 and 45 Vict., Chap. "41. The latter section, so far as is material for purposes of "comparison, is as follows":—

"(2) A conveyance of land, having houses or other "buildings thereon, shall be deemed to include, and shall by "virtue of this Act operate to convey with the land, houses, or "other buildings, all outhouses, erections, fixtures, cellars, "areas, courts, courtyards, cisterns, sewers, gutters, drains, "ways, passages, lights, watercourses, liberties, privileges, "easements, rights and advantages whatsoever, appertaining "or reputed to appertain to the land, houses, or other build- "ings conveyed, or any of them, or any part thereof, or at the "time of conveyance demised, occupied, or enjoyed with, or "reputed or known as part or parcel of, or appurtenant to, the "lands, houses, or other buildings conveyed, or any of them, "or any part thereof."

"(4). This section applies only if and as far as a contrary "intention is not expressed in the conveyance, and shall "have effect subject to the terms of the conveyance, and "the provisions therein contained."

"Whether it was intended by section 8 of Act IV of 1882 "to apply the broad principles of justice, equity, and common- "sense to be found in sub-sections (2) and (4) of section 6 "of 44 and 41 Vict., Chap. 41, is a matter uncertain, and

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[1] Conveyancing and Law of Property Act, 1881.

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"impossible of ascertainment from an examination of section "8 of Act IV of 1882."

"The same word 'annexed' is used in the illustrations to "section 5 of Act V of 1882.[1] As Act IV of 1882 and Act "V of 1882 were passed in the same session of the Indian "Legislature and received the assent of the Governor-General "on the same day, viz. on the 17th February 1882, it might "be expected that some light as to the meaning of a word "common to the two Acts might be obtained by a comparison "of the two Acts."

It should be observed that section 19 of the Indian Easements Act applies the provisions of section 8 of the Transfer of Property Act to devolutions as well as tranfers.[2]

In the same case[3] the separate and combined effects of section 8 of Act IV of 1882, and sections 5, 13, and 19 of Act V of 1882, are discussed as follows :—

"If the words 'annexed' and 'easements' are used with "the same common meaning in section 8 of Act IV of 1882, "and in section 5 of Act V of 1882, we have, in cases not "falling within section 19 of Act V of 1882, this extraordinary "result that on a transfer of a house an easement, whether it "was continuous or discontinuous, apparent or non-apparent, "so long as it was one of the 'easements annexed' to the "house, would, by virtue of section 8 of Act IV of 1882, pass to "the transferee 'unless a different intention is expressed or "'necessarily implied,' and yet when we turn to Act No. V of "1882, which more exclusively and exhaustively deals with "easements, we find that the same easement, if it was not "continuous and apparent, although it was necessary for "enjoying the subject as it was enjoyed when the transfer took "effect, and although it was an easement annexed to the house, "would not under section 13 of Act V of 1882 pass to the "transferee. Yet we presume that the Legislature could not "have intended that in cases not falling within section 19 of

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[1] The Indian Easements Act, *see* App. VII.

[2] *See* App. VII, and *infra*, as to the possible intention of the section, and of s. 8 of the Transfer of Property Act.

[3] *Ubi sup.* at p. 287.

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"Act V of 1882, an easement which would not on a transfer "of property pass by virtue of section 13 of Act V of 1882, "might pass by virtue of Act IV of 1882. In section 19 of "Act V of 1882, which applies to the transfer or devolution of "a heritage which at, and prior to, the time of transfer or "devolution was a dominant heritage, the same generic word "'easement' is used, and is, by the illustration to that section, "applied to a case in which '*A*' has certain land to which "a right of way is '*annexed*. . . .'"

"In order to guard against its being suggested that we "have carelessly read sections 5 and 13 of Act V of 1882, it is "necessary to point out that, although the only apparent "object of section 5 was to provide definitions, by inclusion "and exclusion, of the words 'continuous' and 'apparent' "used in section 13, none of the illustrations to section 5 "seem to be strictly applicable to any easement provided for "by section 13. For instance, illustrations (*a*) and (*c*) to "section 5, which are respectively illustrations of a continuous "easement, and of an apparent easement, assume the existence "of a dominant and servient tenement and a several owner- "ship, but clauses (*b*), (*d*), and (*f*) of section 13 apply to ease- "ments necessary for enjoying the subject or the share, which "were apparent and continuous at or before the time where a "several ownership and a dominant and servient tenement "were created by the transfer, bequest, or partition as the case "might be. However, although the illustrations to section 5 "are not apposite to the cases provided for by section 13, the "meaning of section 5 is obvious."

"It is obvious from what we have pointed out that from a "comparison of Act IV of 1882 and Act V of 1882, confusion "and not light is obtained as to the meaning to be attached to "the word 'annexed' as used by the Legislature. It is also "obvious that if Act V of 1882 applied in this case and were to "be considered as the governing Act and as limiting, so far as "easements are concerned, section 8 of Act IV of 1882, no "right of way over the path in question passed to the plaintiffs "as an incident of the transfer, unless the way was an

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"easement of necessity as distinguished from an easement "apparent and continuous and necessary for the enjoyment of "the Charleville Hotel property, as that property was enjoyed "when the transfer took effect in 1886."

Possible intention of s. 19 of Indian Easements Act, and s. 8 of the Transfer of Property Act.

Perhaps a possible explanation of the apparent confusion is to be found in the view that section 19 of the Easements Act is intended to supplement section 8 of the Transfer of Property Act, and that both sections are confined to easements in the strict legal sense, that is, as being legally appendant or appurtenant at the time of the transfer or devolution, and do not refer to easements and privileges which are used and enjoyed with, or reputed to appertain to, the property without being legally appendant or appurtenant thereto, or to the two classes of easements covered by section 13 of the Easements Act.[1]

Independently of the Indian Easements Act, it seems improbable that section 8 of the Transfer of Property Act is intended to refer to any other easements than those which are legally appendant or appurtenant to the dominant tenement at the time of the transfer.

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[1] It would seem that easements legally appendant or appurtenant would, by virtue of s. 8 of the Transfer of Property Act and s. 19 of the Easements Act, pass under a conveyance or devolution of the property simply without any additional words, but that easements and privileges used and enjoyed with, or reputed to appertain to, the property, but not legally appendant or appurtenant thereto, would not pass under a conveyance of the property without the use of express or general words, except in so far as they would do so by presumption of law as being apparent and continuous, *see infra*, Part IV, B. But *see* the suggestion in *Wutzler* v. *Sharpe*, I. L. R., 15 All., 270 (299), that the principles of justice, equity, and good conscience embodied in s. 6, sub-ss. (1), (2) of the Conveyancing and Law of Property Act, 1881, might be called in aid unless a contrary intention was expressed or necessarily implied in the conveyance (*see* further, *infra*, "Acquisition of discontinuous easements by "implied grant"). In England the statutory general words which a conveyance of land or land with buildings is deemed to include (*see* Conveyancing Act, 1881, s. 6 (1), (2), embrace not only all legal rights and easements in existence at the date of the conveyance, but all advantages and privileges then actually enjoyed with the land (*see* Gale, 8th Ed., p. 85), notwithstanding that the enjoyment may be altogether permissive and precarious, *International Tea Stores* v. *Hobbs* (1903), 2 Ch., 165; and *see Godwin* v. *Schweppes* (1902), 1 Ch., 926 (932); *Quicke* v. *Chapman* (1903), 1 Ch., 659 (666). But they will not cover any right or easement which the vendor had no power to grant at the time of the conveyance, *Godwin* v. *Schweppes*; *Quicke* v. *Chapman*, *ubi sup*.

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Powers of lessor and mortgagor to create easements.

A lessor may create over the property leased by him any easement that does not derogate from the rights of the lessee as such, and similarly a mortgagor may create over the mortgaged property any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, create any other easement over such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.[1]

Power of tenant to create easements.

A tenant may create an easement over the land leased to him for the term of his lease or a less term,[2] but no lessee or other person having a derivative interest may create over the property held by him, as such, an easement to take effect after the expiration of his own interest or in derogation of the right of the lessor or superior proprietor.[3]

By whom easements may be acquired.

An easement may be acquired in respect of a tenement for the advantage or benefit whereof the right comes into existence, either by the owner of such tenement or on his behalf by any person in possession thereof.[4]

And one of two or more co-owners of immoveable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.[5]

Limited power of acquisition by a tenant.

Though (subject to certain exceptions) a tenant cannot by user or prescription acquire an easement for a term of years in respect of the property comprised in the lease,[6] he can by express grant, or necessary implication therefrom, have such an easement commensurate with his lease.[7]

But no lessee of immoveable property can acquire[8] for the

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[1] *See* I. E. Act, s. 10, App. VII.

[2] *See* I. E. Act, s. 8, ill. (*a*), App. VII.

[3] *See* I. E. Act, s. 11, App. VII.

[4] *Ackroyd* v. *Smith* (1850), 10 C. B., 164; 19 L. J. C. P., 315; *Kristna Ayyan* v. *Vencatachella Mudali* (1872), 7 Mad., H. C. at p. 64; *Kilgour* v. *Gaddes* (1904), 1 K. B., 457; I. E. Act, ss. 4 and 12 (first para.), App. VII.

[5] *See* I. E. Act, s. 12 (second para.), App. VII.

[6] *See infra* Chap. VII, Part I, B, and Parts II and III.

[7] *Kristna Ayyan* v. *Vencatachella Mudali*, *ubi sup.*; *Wheaton* v. *Maple & Co.* (1893), 3 Ch., 48, 62, 63; *May* v. *Belleville* (1905), 2 Ch., 605 (611). *See* also *Kilgour* v. *Gaddes*, *ubi sup.*

[8] Otherwise than by express arrangement with his landlord or necessary implication therefrom, for it is contrary to first principles for a tenant to prescribe

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beneficial enjoyment of other immoveable property of his own, an easement *in or over* the property comprised in the lease.[1]

Affirmative and negative easements, how created.

Affirmative easements are usually created by grant and negative easements by covenant.[2]

Construction of grant. Covenant may operate as grant.

Any form of words, when properly construed with the aid of all that is legitimately admissible to aid in the construction of a written document, may indicate an agreement and, when under seal, constitute a covenant, and a covenant may, if it is necessary in order to carry out the intention, operate as a grant.[3]

Equitable distinction between grant of easement in general terms and a grant or representation of power to grant for a particular term.

There is a very material difference in equity between a grant of an easement in general terms and an agreement that the easement shall continue for a particular term or a representation that the grantor has power to grant for such term. In the former case the grant will be restricted to what the grantor has the power to grant, and will not extend to anything which he may subsequently acquire, whereas in the latter case the grant will extend to any interest subsequently acquired.

Booth v. *Alcock*.

Thus, in *Booth* v. *Alcock*,[4] a lessor granted a lease for twenty-one years of a house "together with all edifices, buildings, ways, lights, sewers, watercourses, rights, easements, advantages, and appurtenances thereto belonging, or therewith used or enjoyed." At the time of the grant he held an adjoining house for a term of years. He subsequently acquired the reversion expectant on the term in the adjoining house; and after the expiration of the term he proceeded to build on the

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against his landlord, *see Gayford* v. *Moffatt* (1868), L. R., 4 Ch., 133; *Outram* v. *Maude* (1881), 17 Ch. D., 391.

[1] I. E. Act, s. 12 (third para.), App. VII. The effect of this section is to neutralise, so far as it goes, the omission of the words "as of right" in connection with the acquisition by a tenant of easements of light and air, and of support under s. 15, but, apparently, it would still be open to a tenant to acquire such prescriptive easements in respect of the land comprised in his tenancy over other land belonging to his landlord or any other person, whether the servient tenement were in possession or in lease, *see* this question further considered in Chap. VII, Part I, B, and Part II.

[2] *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 782.

[3] *Russell* v. *Watts* (1883), 10 App. Cas. at p. 611.

[4] (1873) L. R., 8 Ch. App., 663.

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site of the adjoining house in a manner which might interfere with the lights of the demised house, such lights not being ancient lights. In a suit to restrain him from so building, it was held by the Appeal Court (reversing the decision of Malins, V.C.) that the lessor was not by his grant prevented from so building.

This and later cases[1] establish that in the absence of contract or representation, the rule that a man may not derogate from his own grant binds only the interest which the grantor has in the adjoining property at the time of the grant.

Estoppel in case of interest subsequently acquired by grantor of easement.

But if a person grants an easement upon the representation that he has the title to do so and he has not the title at the time of the grant, but subsequently acquires it, the easement so granted attaches to the newly-acquired property and the conveyance operates by way of estoppel against the denial of the right.[2]

Grant of easement void if at variance with an act of the legislature.

The grant of an easement is void, if it is at variance with the provisions or objects of an act of the legislature.[3]

Thus, the alienation by a railway company of a right of way over land taken and used by it for the purpose of a railway and its works has been held to be *ultra vires*.[4]

Limits of the principle.

But this principle cannot be so applied as to prevent a company from using the land acquired by it in any way which is not incompatible with the purposes for which the company was constituted.[5]

Grant may be valid where subject of easement divisible.

Though the grant of an easement is of no effect if in contravention of the powers of the company and of the

[1] *See Godwin* v. *Schweppes, Ltd.* (1902), 1 Ch., 926 (932); *Quicke* v. *Chapman* (1903), 1 Ch., 659 (666); *Davis* v. *Town Properties Investment Corporation, Ltd.* (1903), 1 Ch., 797.

[2] *Rowbotham* v. *Wilson* (1857), 8 E. & B. at p. 145, and *see Booth* v. *Alcock, ubi sup.* And cf. Transfer of Property Act, IV of 1882, s. 43, App. VI.

[3] *See Mulliner* v. *Midland Ry. Co.* (1879), 11 Ch. D., 611; *Neaverson* v. *Peterborough Rural District Council* (1902), 1 Ch., 557. The same applies to any illegal grant; prescription cannot run in such a case, *Ibid.*

[4] *Mulliner* v. *Midland Ry. Co., ubi sup.*

[5] *Foster* v. *London, Chatham & Dover Ry. Co.* (1895), 1 Q. B., 711. And *see Bayley* v. *Great Western Ry. Co.* (1884), 26 Ch. D., 434, 450.

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purposes for which it is constituted, yet if the subject of the easement be capable of division in such a way as after the public requirements have been fully satisfied to be applicable to private use, then the grant will be valid to such extent.

Att.-Genl. v. *Corporation of Plymouth.*

Thus, in *Attorney-General* v. *The Corporation of Plymouth*,[1] the Corporation having been empowered by Act of Parliament to construct a watercourse for the purpose of supplying the ships in the harbour of *Plymouth* and the town of *Plymouth* with water, leased a portion of their interest in the watercourse for the benefit of certain mills which had been erected thereon.

It was held by the Master of the Rolls that as the Corporation had undertaken the performance of a public trust and duty and could not lawfully divest themselves of the means or any part of the means of fully performing that duty and executing that trust, all that was conveyed or was meant to be conveyed by the deed was so much water as remained after the public purposes of the Act had been satisfied.

Such an easement acquirable by prescription.

It seems that an easement of the limited character just considered can be acquired by prescription.[2]

As the grant of an easement which affects the same servient tenement as that over which a previously existing easement has been created holds good provided the enjoyment of the later easement does not interfere with that of the earlier, so it is stating the same proposition in another way to say that a later grant cannot derogate from an earlier grant, and if at variance with it is void as against the first grantee.[3]

Extent of covenant for quiet enjoyment.

Though a covenant for quiet enjoyment, either express or implied, will extend to an easement part and parcel of the grant,[4] it will not increase or enlarge the easement.[5]

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[1] (1845) 9 Beav., 67.

[2] *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D., 273. This was a case of a public right of way acquired by dedication, but the principle is the same.

[3] *Mundy* v. *Duke of Rutland* (1883), 23 Ch. D., 81.

[4] *See* Gale on Easements, 8th Ed., pp. 85, 86.

[5] *Leech* v. *Schweder* (1874), L. R., 9 Ch. App. at p. 474. *See* also *Booth* v. *Alcock* (1873), L. R., 8 Ch. App., 663; *Robinson* v. *Kilvert* (1889), 41 Ch. D., 88; *Aldin* v. *Latimer, Clark, Muirhead & Co.* (1894), 2 Ch., 437; *Davis* v. *Town Properties Investment Corporation, Ltd.* (1903), 1 Ch., 797.

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Thus, in the grant of an easement of light and air a covenant for quiet enjoyment would not enlarge the easement beyond the ordinary right known to the law.

It would, of course, be possible to insert in any covenant words of enlargement, as if in a grant of an easement of light and air a covenant were inserted that the grantee should fully enjoy the house with an uninterrupted view from his drawing-room windows over the existing land of the grantor. In such case there would be a larger light than had previously been granted, and damages might be recovered at law if the grantor broke the covenant, and an injunction would be granted in equity against him if he intended to break it, or against the person claiming under the grantor if he took with notice of the covenant.[1]

Implied covenant for quiet enjoyment.

An implied covenant for quiet enjoyment arises where a grant of land has been made for a particular purpose either appearing in the grant itself or to which it was in the knowledge or contemplation of the parties that the land would be applied.[2]

In such a case the grantor is under an obligation to abstain from doing anything on adjoining land belonging to him which would prevent the land granted from being used for the purpose for which the grant was made.[3]

This really amounts to the same thing as saying that a grantor shall not derogate from his own grant.[4]

What is a breach of the covenant.

The question whether there has been a breach of a covenant for quiet enjoyment depends upon the test whether, as a question of fact, the quiet enjoyment of the land has or has

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[1] *Leech* v. *Schweder* (1874), L. R., 9 Ch. App., 463.

[2] *Robinson* v. *Kilcert; Aldin* v. *Latimer, Clark, Muirhead & Co., ubi sup. See* also *Lyttleton Times Co., Ltd.* v. *Warners, Ltd.* (1907), App. Cas., 476.

[3] *Ibid.* And upon similar principles the grantee may be equally bound, *Lyttelton Times Co., Ltd.* v. *Warners, Ltd., ubi sup.*

[4] *Robinson* v. *Kilvert, ubi sup.* at p. 95. But only as between the grantor and the grantee, for an implied covenant being an equitable obligation would not bind the grantor's assigns without notice, whereas the obligation not to derogate from a grant is a legal obligation and is as binding on the grantor's assigns as on the grantor, *Cable* v. *Bryant* (1908), 1 Ch., 259. As to derogation from grant, *see* further, *infra*, Part IV, B, I, (*a*), (1).

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not been interrupted; and, where by the acts of the grantor, and those lawfully claiming under him, the ordinary and lawful enjoyment of the land is substantially interfered with, the covenant is broken, though neither the title to, nor the possession of, the land may be otherwise affected.[1]

Question whether grant of easement valid without writing.

It is a question of some difficulty whether it is essential to the validity of an agreement to grant an easement that it should be in writing.

In England.

In England the old common law rule was invariable that an express agreement to create an easement should be by instrument under seal,[2] and the necessity for this rule was due to reasons derived from the feudal and statute law.[3]

The strictness of the rule was, however, subsequently relaxed by the introduction of the equitable principle that where an agreement had been made and acted upon, but no grant executed, the Court would not decline to give effect to the right claimed for want of the full legal title.[4]

In India.

In India there does not appear to be any law requiring the express grant of an easement, as referring to the actual creation of the right, to be in writing.

In cases falling outside the Indian Easements Act it has been said not to be necessary,[5] and it is certainly not required by the Act itself.[6]

There are, no doubt, certain provisions in the Transfer of Property Act requiring the transfer of immoveable property by gift or sale to be made by a registered instrument, but these do not apply to easements.[7]

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[1] *Saunderson* v. *Mayor of Berwick-upon-Tweed* (1884), 13 Q. B. D., 547, 551; *Robinson* v. *Kilvert*, *ubi sup.*, at pp. 96, 97; but *see* *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Anderson* (1898), 2 Ch., 394. And *semble* the interference must be direct, *Davis* v. *Town Properties Investment Corporation, Ltd.*, *ubi sup.*

[2] Gale on Easements, 8th Ed., p. 30.

[3] *Heardine* v. *Shippam* (1826), 5 B. & Cr., 221; *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98.

[4] *Duke of Devonshire* v. *Eglin* (1851), 14 Beav., 530.

[5] *Krishna* v. *Rayappa*, *ubi sup.*; *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., at p. 22; *Gazette of India* (1880), July to Dec., Part V, p. 477. A verbal promise, or representation, or an agreement to be inferred from conduct, is sufficient to create an easement, *Collector of 24 Pergunnahs* v. *Nobin Chunder Ghose* (1865), 3 W. R., 27.

[6] *Gazette of India* (1880), July to Dec., Part V, p. 477.

[7] Act IV of 1882, ss. 54, 123.

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The definition of "Immoveable property" in section 3 of the Indian Registration Act, III of 1877, includes easements, and section 17 provides for the compulsory registration of instruments relating to the gift of immoveable property or the creation of interests in immoveable property of the value of Rs.100 and upwards, but registration only becomes necessary if there is writing, and there appears to be nothing in the Act making *writing* compulsory.

No doubt as a matter of prudence the creation of an easement would usually be accompanied by a written and registered document, but there appears to be no legal necessity for such a course.

Where a grant is not in writing, it is a question of fact whether the effect of the oral communication is such as to create an easement or a mere license.[1] Effect of oral communication.

Part II.—By Express Grant.

An express grant is that whereby, either in deed or will, the intention of the grantor or devisor to create, convey, or devise an easement is clearly and unequivocably expressed. Express grant defined.

There is no necessity to use any special form of words, so long as the words used sufficiently express the intention of the grantor or devisor. No particular words necessary.

In *Rowbotham* v. *Wilson*,[2] Lord Wensleydale said: "It is "undoubted law that no particular words are necessary to a "grant; and any words which clearly shew the intention to "give an easement which is by law grantable, are sufficient to "effect that purpose."

In construing an express grant it is always the safest and best course to give words free from ambiguity their plain and ordinary meaning.[3] Rule of construction.

In *Taylor* v. *Corporation of St. Helens*,[4] the true rule of construction is stated by Jessel, M.R., to be that the language *Taylor* v. *Corporation of St. Helens.*

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[1] *See Krishna* v. *Rayappa*, *ubi sup.*

[2] (1860) 8 H. L. C. at p. 362.

[3] *Buchanan* v. *Andrew* (1873), L. R., 2 H. L. Sc , 286 (298), *per* Lord Chelmsford.

[4] (1877) 6 Ch. D., 264.

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of the particular instrument is to be construed according to its ordinary meaning, giving to technical terms their technical meaning, unless a context is found such as to preclude the application of the ordinary rules of construction which would be applied to the original expressions standing alone.

The meaning of the instrument must be ascertained according to the ordinary and proper rules of construction, and if the meaning cannot be ascertained the instrument is void for uncertainty.[1]

Rule as to uncertain grant being construed most strongly against grantor.

It was formerly an unquestioned rule of construction that when the meaning of a grant was uncertain, the grant was to be construed most strongly against the grantor.[2] *Verba chartarum fortius accipiuntur contra proferentem*. But this rule has been somewhat severely criticised by Jessel, M.R., in *Taylor* v. *Corporation of St. Helens*,[3] as follows:—

". . . I will take the liberty of making an observation as "regards a maxim quoted by Mr. Christie, and which is to be "found, I believe, in a great many text-books, and, I am "afraid, also in a great many judgments of ancient date, and "that is, that a grant, if there is any difficulty or obscurity as "to its meaning, is to be read most strongly against the

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[1] *Taylor* v. *Corporation of St. Helens*, *ubi sup.* In this case there had been a grant of "all and singular the water-"courses, dams, and reservoirs, etc.," and one of the questions raised was as to the meaning of the word "watercourse." To quote from the judgment: "This "is a grant of a watercourse. . . . A grant "of a watercourse in law, especially "when coupled with other words, may "mean any one of three things. It may "mean the easement or the right to the "running of water; it may mean the "channel pipe or drain which contains "the water; and it may be the land over "which the water flows—which it does "mean must be shewn by the context, and "if there is no context, I apprehend that it "would not mean anything but the ease-"ment, a right to the flow of water." It was held that a watercourse as used in the grant was a corporeal hereditament, and bore the second of the above meanings. In the same case there was the further grant "of the several springs and "streams of water flowing into or feeding "the said watercourses, etc." As to these, the intention imputed to the grantor was to grant them as definite things, as they were, and in addition to the watercourse. Also, it was held that there had not been a grant of all the water arising in or falling on to the plaintiff's land, but only a grant of the watercourse in its existing state, and that, accordingly, the defendants had no right to alter or enlarge the existing watercourse.

[2] *See Morris* v. *Edgington* (1810), 3 Taunt. at p. 30; *Wood* v. *Saunders* (1875), 44 L. J. Ch., 514; L. R., 10 Ch. App., 582.

[3] (1877) 6 Ch. D., 264.

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"grantor. I do not see how, according to the now established "rules of construction as settled by the House of Lords in the "well-known case of *Grey* v. *Pearson*,[1] followed by *Roddy* v. "*Fitzgerald*,[2] and *Abbott* v. *Middleton*,[3] that maxim could be "considered as having any force at the present day. The "rule is to find out the meaning of the instrument according "to the ordinary and proper rules of construction. If we can "thus find out its meaning, we do not want the maxim. If, "on the other hand, we cannot find out its meaning, then the "instrument is void for uncertainty, and in that case it may 'be said that the instrument is construed in favour of the "grantor, for the grant is annulled."

But between the two extremes stated by the Master of the Rolls there lies the intermediate case of an instrument equally capable of two meanings. In such a case authority appears to shew that the meaning most unfavourable to the grantor should be adopted provided no harm is thereby done.[4]

Rights acquirable by express grant.

Not only can easements proper be acquired by express grant, but also many rights which not being strictly easements partake of the nature of easements, though such latter rights cannot be made the subject of presumed grants by operation of law, or by prescription.[5]

Persons, otherwise incapable, can acquire by express grant.

So, too, certain persons who are unable to acquire easements by the two latter methods of acquisition, can acquire them by express grant.[6]

Part III.—By Implied Grant.

Definition of implied grant.

An implied grant, in the sense here used, is a grant which arises by implication from the language of the particular instrument construable according to the ordinary rules of construction, one of which is that the circumstances existing

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[1] (1857) 6 H. L. C., 61.

[2] (1857) 6 H. L. C., 823.

[3] (1858) 7 H. L. C., 68.

[4] *See* Elphinstone, Norton, and Clark on Interpretation of Deeds, pp. 93 *et seq.*; Brown's Legal Maxims, 6th Ed., p. 548. And *see* the comments in Goddard on Easements, 6th Ed., pp. 367, 368.

[5] *See supra*, Chap. III, Part III, B; Chap. IV, Part II, C.

[6] *See supra*, "Limited method of acquisition by a tenant."

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at the date of the grant may be looked at in order to ascertain the intention of the parties.[1]

Implied devise.

In this respect the same rules of construction and evidence are applicable to a devise by will.[2]

Distinction between acquisition of discontinuous easements by implied grant and acquisition of easements of necessity and apparent and continuous easements by presumed grant or operation of law.

This method of acquisition which is usually, but not necessarily, connected with a severance of tenements by the common owner thereof, and will presently be considered chiefly in connection with discontinuous easements, such as easements of way, must be treated separately from, and, therefore, should not be confused with, the acquisition by presumed grant, or operation of law, of easements of necessity[3] and apparent and continuous easements[4] which depends solely on a severance of tenements.

Polden v. *Bastard.*

This distinction is pointed out by Erle, C.J., in *Polden* v. *Bastard*,[5] where he says: "There is a distinction between "easements such as a right of way or easements used from "time to time, and easements of necessity, or continuous "easements. The cases recognise this distinction, and it is "clear law that upon a severance of the tenements, easements "held as of necessity, or in their nature continuous, will pass "by implication of law without any words of grant; but with "regard to easements which are used from time to time only, "they do not pass unless the owner by appropriate language "shows an intention that they should pass."[6]

Questions of construction as to whether the entire interest in the land conveyed or an easement only.

Questions of construction have occasionally arisen as to

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[1] As to discontinuous easements, *see infra* under "Acquisition of discontinu-"ous easements by implied grant," and Chap. VIII, Part I, C (1). As to other easements, *see* Chap. III, Parts IV and V, Chap. VI, Part IV, B I (*a*) (1), Chap. VIII, Part I, B (1), Part II. As to easements arising in favour of the grantor by implied reservation, *see* Chap. IV, Part IV, I (2) (*a*), Part V, Chap. VI, Part IV B I (*b*), B II and B III.

[2] *Pheysey* v. *Vicary* (1847), 16 M. & W., 484; *Pearson* v. *Spencer* (1861), 1 B. & S., 671, in error (1863), 3 B. & S., 761; *Polden* v. *Bastard* (1863), 4 P. & S., 258; L. R., 1 Q. B., 156; *Phillips* v. *Low* (1892), 1 Ch., 47; *Milner's Safe Co., Ltd.* v. *Great Northern and City Ry. Co.* (1907), 1 Ch. 208.

[3] *See infra*, Part IV, A.

[4] *I.e.* easements of light and air, easements relating to water, and easements of support, *see infra*, Part IV, B.

[5] (1863) L. R., 1 Q. B., 156.

[6] Approved in *Watts* v. *Kelson* (1870), L. R., 6 Ch. App., 166. *See* also *Allen* v. *Taylor* (1880), 16 Ch. D. at p. 357; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 52; *Purshotum* v. *Durgoji* (1890), I. L. R., 14 Bom., 452; and *infra* generally.

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whether the grant is to be construed as conveying the land itself, and thereby excluding the grantor from all further interest in, and enjoyment of, the land or its produce, or as confining the grantee's rights within the limits of a mere easement or *profit à prendre*.

In this connection it has been held that the grant of a house together with the exclusive use of a gateway described by particular dimensions and being a covered passage, carried with it not only the right to use the gateway as a means of access to the dominant tenement, but a right of property in the passage itself so as to permit of a bookstall being put up in it.[1]

In regard to minerals, it has been held in determination of the question whether the land itself was conveyed or merely the right to get the minerals, which is a *profit à prendre*, that the grant of a right to get all the coal lying in a particular close, is a grant of the land itself, a corporeal right, conveying the entire interest of the grantor.[2] Minerals.

In the absence of clear and explicit language shewing an intention to convey the greater right, the Court will decide in favour of the lesser right.[3]

"*Lord Mountjoy's case*[4] is a leading authority for the "proposition that a grant in fee of liberty to dig ores does not "confer on the grantee an exclusive right to dig them, even "if the grant is in terms without any interruption by the "grantor. This was the view taken of the case in *Chetham* "v. *Williamson*,[5] and in *Doe* v. *Wood*,[6] and has never been "judicially questioned." *Lord Mountjoy's case.*

Such is the language of Lindley, L.J., in the recent case of *Duke of Sutherland* v. *Heathcote*.[7]

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[1] *Reilly* v. *Booth* (1890), 44 Ch. D., 12; distinguishing *London Taverns Co.* v. *Worley* (1888), 44 Ch. D. at p. 24; where there was a grant of "the exclusive right of gateway"; and *see Buszard* v. *Capel* (1828), 8 B. & C., 141.

[2] *Sanders* v. *Norwood* (1600), 2 Cro. Eliz., 683; *Wilkinson* v. *Proud* (1843), 11 M. & W., 33.

[3] *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch., 475.

[4] (1583) 1 And., 307; 4 Leon., 147.

[5] (1804) 4 East, 469.

[6] (1819) 2 B. & Ald., 724.

[7] (1892) 1 Ch. at p. 485.

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Acquisition of Discontinuous Easements by Implied Grant.

General words. Their legal meaning and effect.

It will be appropriate to consider, in the first place, the legal significance and effect of general words such as "appurtenant," "belonging," "therewith used and enjoyed," and similar words, when appearing in a will or conveyance.

It may be stated by way of preface to a detailed examination of the cases that a distinction has been made between the legal meaning of the words "appurtenant," "belonging," etc., and that of the words "therewith used and enjoyed," etc. For while the former words have been held ineffectual to carry anything more than a right legally appurtenant (*i.e.* an easement actually in existence at the time of the grant), the latter words have received the wider interpretation of passing in addition a way enjoyed *de facto* by the owner of the united property for his own greater convenience.

"Appurtenant," "belonging."

Whalley v. *Thompson*.

Thus, in reference to the words "appurtenant," or "belonging," it will be found that in *Whalley* v. *Thompson*,[1] one of the earliest reported cases, the use of the word "appurtenances" in a devise of one of adjoining properties held in unity of seisin was declared insufficient to carry a right of way over one property to the other as no new right of way was thereby created, the old right of way which previously existed having been extinguished by the unity of seisin in the devisor.

Clements v. *Lambert*.

In *Clements* v. *Lambert*[2] it was held that after an easement has been extinguished by unity of possession, a new easement is not created by a grant of a messuage and land with common appurtenant, though those who have occupied the tenement since the extinguishment have always used the common therewith, but it would have been otherwise if there had been a grant of all commons "used therewith."

"Therewith used and enjoyed," and the like words.

Barlow v. *Rhodes*.

Barlow v. *Rhodes*[3] was an action for trespass for breaking and entering the plaintiff's close and pulling down his wall.

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[1] (1799) 1 B. & P., 371.

[2] (1808) 1 Taunt., 205.

[3] (1833) 1 C. & M., 448.

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The defendants pleaded several special pleas, of which only the third and seventh were relied upon at the trial.

The third plea justified the trespasses, under a claim of a right of way under a grant in which certain premises had been conveyed "together with all ways, roads, rights of road, paths "and passages to the hereby devised premises, or any part "thereof, belonging or in any wise appertaining."

The seventh plea claimed a right of way of necessity.

A right of way by necessity being unarguable the solo remaining question was whether the way claimed could pass under the general words in the deed "belonging or in any "wise appertaining."

The way was not in existence at the time of the grant having been extinguished by unity of ownership, and was therefore not appurtenant, and there was nothing in the conveyance to shew that the parties intended to use the word "appurtenant" in any but its strict legal sense.

In these circumstances the Court was constrained to give the words used their ordinary legal meaning, and to hold that they were not sufficient of themselves to shew an intention on the part of the grantor to create the right claimed, but at the same time it was said that if the words "therewith used and "enjoyed" had been inserted, the right claimed would have passed.

An attempt was made on behalf of the defendants to distinguish between the word "belonging" and the word "appertaining," but without success, the older authorities shewing that these words had always been treated as synonymous.

Morris v. Edgington explained.

The defendants strongly relied upon the case of *Morris* v. *Edgington*,[1] in which similar words had been used and a right of way allowed, but that case was explained by Lord Lyndhurst, C.B., as one where the deed itself shewed that it was the obvious intention of the parties that the word "appurtenant" should receive a more extensive construction than its usual

[1] (1810) 3 Taunt., 24.

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legal meaning admitted of, and by Bayley, B., as a case merely of a way of necessity, and not as one properly requiring the construction of the words "belonging" and "appertaining," because if there had been no such words, the law would have presumed the way in question, on the principle that where property is granted, a right of access to the property is also granted.[1]

In that case a way was necessary to the use of the dominant tenement, and there being two ways whereby such access could be had, all the Court had to decide was to which of the two the plaintiff was entitled as being the more natural and convenient way.

Pheysey v. *Vicary.*

In *Pheysey* v. *Vicary*[2] a testator being seised in fee of two houses devised them and the "appurtenances thereunto "belonging" to two separate persons, and it was held that these words were not sufficient to give the devisee claiming it a right of way over the other devisee's property, such right of way not being a way of necessity.

Worthington v. *Gimson.*

In *Worthington* v. *Gimson*[3] it was held that the right of way claimed in that case passed neither by implied grant nor by presumption of law, for the use merely of the words "rights, "members, easements, and appurtenances" was insufficient to carry it by implied grant, and the way, not being an apparent and continuous easement necessarily passing upon the severance of the property, as being incident to the separate enjoyment of the part severed, could not pass by presumption of law.

Polden v. *Bastard.*

In *Polden* v. *Bastard*[4] there was a devise of two houses, one in the occupation of the devisor and another in the occupation of a tenant of the devisor.

Under the devise of the latter house whereby merely the house, out-house, and garden had been given and nothing

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[1] The same view appears to have been taken by Parke, B., in *Pheysey* v. *Vicary* (1847), 16 M. & W., 484. But *see* the observations of Edge, C.J., and Aikman, J., in *Watzler* v. *Sharpe* (1893), I. L. R., 15 All., 270.

[2] (1847) 16 M. & W., 484.

[3] (1860) 2 E. & E., 618.

[4] (1863) 1 B. & S., 258; L. R., 1 Q. B., 156.

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more, the right was claimed to go and draw water from a pump which belonged to the house occupied by the devisor, and which the tenant of the devisor, as the occupier of the other house, had been accustomed to go and draw water from, to the knowledge of the devisor. It was decided that no such right passed under the devise, but the Court expressed the opinion that if the will had contained words shewing that the house was intended to be devised "as usually enjoyed before" it might have been successfully contended that the right to use the pump, which had been enjoyed by the tenant of the house for two years, would pass, though not properly an easement.

Rule of English law followed in India.

The rule of English law that the use of the words "appurtenant" or "belonging" will not carry a discontinuous easement, such as a right of way, not in existence at the time of the grant, has been followed in India.[1]

Chunder Coomar Mookerjee v. *Koylash Chunder Sett*

In *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett*[2] the words "appurtenant" or "belonging" were considered as ordinarily carrying only *existing* discontinuous easements, though it was thought they might, under certain circumstances, have a wider construction, as in *Morris* v. *Edgington*.[3]

From the foregoing authorities it is apparent that the legal effect of the words "appurtenent" or "belonging," used in their ordinary legal sense, is to pass only such ways as are actually in existence at the time of the grant as *Easements*.

Earlier authorities on effect of words "therewith used and enjoyed," etc.

As regards the additional effect of the words "therewith "used and enjoyed" the latest decisions[4] have confirmed the view taken in the earlier cases,[5] that such words will carry a way which, though not in existence as an easement at the time of the grant, was used during the unity of possession or ownership for the convenience of the portion of the property the subject of the conveyance.

Koostrya v. *Lucas*

In *Koostrya* v. *Lucas*,[6] the first of the earlier cases to which

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[1] *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46; *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665.

[2] (1881), I. L. R., 7 Cal., 665.

[3] (1810) 3 Taunt., 24. *See* this case discussed *supra*.

[4] Subsequent to *Thomson* v. *Waterlow* and *Langley* v. *Hammond*, decided in 1868, as to which, *see infra*.

[5] Prior to 1868.

[6] (1822) 5 B. & Ald., 830.

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it is necessary to refer, part of certain premises which belonged in their entirety to the grantor was leased to the plaintiff "together with all ways thereto belonging or appertaining, "or therewith or *with any part thereof used or enjoyed*."

It appeared that at the time of granting the lease and for many years prior thereto, a way was being, and had been, used for horses and cattle by the occupier of the whole premises through a gateway and on to a piece of ground on which the plaintiff had built a coach-house and stable. The plaintiff claimed to use the way under the lease. It was held that as the way was used and enjoyed with a part of the demised premises it passed to the plaintiff by the words "with any part "thereof used or enjoyed" contained in the lease.

Barlow v. *Rhodes*. *Polden* v. *Bastard*.

To the same effect are the decisions in *Barlow* v. *Rhodes* and *Polden* v. *Bastard* above cited.[1]

Application of similar principles on partition of joint property. *James* v. *Plant*.

The case of *James* v. *Plant*[2] is important as shewing that the same principle has been applied on a partition of joint property.

In that case the properties, formerly separate, vested in coparceners as one joint property. Thereafter, a way which before the unity of seisin had been enjoyed from one property over the other continued to be used.

The coparceners for the purpose of making partition conveyed the property in two separate estates as had formerly existed to a grantee to uses to hold the same to the use in fee of two distinct persons. In conveying the messuages, tenements, lands, etc., the coparceners also conveyed all houses, out-houses, ways, easements, etc., to the said several messuages or tenements, lands, etc., belonging or appertaining, or *therewith usually held, used, occupied, or enjoyed*, to have and to hold the messuages, etc., with the buildings, lands, etc., thereunto belonging, *and their appurtenances* to the grantor to the use of the said two persons.

It was held (reversing the judgment of the Queen's Bench)

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[1] As to the recent decisions in England and India on the same question, *see infra*.

[2] (1863) 4 A. & E., 749.

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that from the deed itself it was obviously the intention of the grantors that the right of way should pass and that the words above cited were sufficient to carry such intention into effect.

As to the use of the word "*appurtenances*" standing alone in the habendum, it was not considered that it affected in any way the implied grant arising from the use of the former words, as it was not to be taken by itself but with reference to the rest of the deed, and as thereby receiving a more enlarged meaning sufficient to let in and comprehend a right of way which had been "usually held, used, occupied, or enjoyed."

Result of the earlier authorities.

The result of this and the earlier cases upon the question whether on the severance of tenements formerly held in joint or sole ownership a way enjoyed *de facto* at the time of the grant has passed under the particular instrument, is concisely stated by Tindal, C.J., in the case just cited. He says: "We "all agree that, where there is a unity of seisin of the land, "and of the way over the land, in one and the same person, "the right of way is either extinguished or suspended accord-"ing to the duration of the respective estates in the land "and the way; and that, after such extinguishment, or "during such suspension of the right, the way cannot pass "as an *appurtenant* under the ordinary legal sense of that "word."

"We agree also in the principle laid down by the Court of "King's Bench that, in the case of a unity of seisin in order to "pass a way existing in point of user, but extinguished or sus-"pended in point of law, the grantor must either employ words "of express grant, or must describe the way in question as one "'used and enjoyed with the land' which forms the subject-"matter of the conveyance."

Effect of similar words in connection with easement to divert water.

By analogy to the foregoing cases the words "therewith used and enjoyed" have been declared to have a similar effect in the case of an easement to divert water claimed under a conveyance which purported to be of "all waters, watercourses, "privileges, easements, advantages, and appurtenances, to "the premises belonging or in anywise appertaining, or to or

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"with the same or any part thereof held, used, occupied, or "enjoyed."[1]

But since the case of *Watts* v. *Kelson*,[2] an easement of the kind just mentioned would appear on a severance of the tenements to pass more properly by presumption of law than under an implied grant depending on the particular words used.[3]

Later authorities on effect of words "therewith used and enjoyed," etc.

Though, according to the earlier authorities, there was no question that the use of the general words "therewith held or used," or "therewith used and enjoyed," or of like words, was effectual to carry a way actually enjoyed at the time of the grant, whether such way had or had not existed before the unity of possession, a distinction was introduced into the law by the later cases of *Thomson* v. *Waterlow*[4] and *Langley* v. *Hammond*,[5] and some countenance was given to the proposition that a way not used as an easement prior to the unity of possession, but made during that period by the owner or occupier of both properties, would not so pass.[6] This distinction (for which there appears to have been no foundation on principle) between ways enjoyed *as of right* and ways enjoyed *de facto* only was rejected by the later decisions in *Watts* v. *Kelson*,[7] *Kay* v. *Oxley*,[8] *Barkshire* v. *Grubb*,[9] and *Bayley* v. *Great Western Railway Co.*,[10] and is no longer recognised.[11]

Kay v. *Oxley*.

Thus, in *Kay* v. *Oxley*, Lord Blackburn says[12]: "It cannot "make any difference in law whether the right of way was "only *de facto* used and enjoyed, or whether it was originally "created before the unity of possession, and then ceased to "exist as a matter of right, so that in the one case it would be "created as a right *de novo*, in the other merely revived. But "it makes a great difference, as matter of evidence on the

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[1] *Wardle* v. *Brocklehurst* (1859), 1 E. & E., 1058.

[2] (1870) L. R., 6 Ch. App., 166.

[3] As a *quasi*-easement, *see* Part IV, B.

[4] (1868) L. R., 6 Eq., 36.

[5] (1868) L. R., 3 Exch., 161.

[6] *See* the observations of Fry, J., in *Barkshire* v. *Grubb* (1881), 18 Ch. D., 616 (621).

[7] (1870) L. R., 6 Ch. App., 166.

[8] (1875) L. R., 10 Q. B., 360.

[9] (1881) 18 Ch. D., 616.

[10] (1884) 26 Ch. D., 434.

[11] *See* *Wutzler* v. *Sharpe* (1893), I. L. R., 15 All., 270.

[12] *Ubi sup.* at p. 367.

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"question, whether the way was used and enjoyed as appur-
"tenant."

And to use the language of Bowen, L.J., in *Bayley* v. *Great Western Railway Co.*[1]: "It is still, I think, a question of con- "struction . . . the mere fact that the way did not exist as "a right of way before unity of possession, and was only "enjoyed as a way before unity of possession, will not prevent "the Court putting such a construction upon general words "which, *primâ facie*, might apply to rights and not to ways "enjoyed *de facto* only, as is to be gathered from the true "intention of the parties." *Bayley* v. *Great Western Ry. Co.*

In India, in *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett*,[2] the decisions in *Thomson* v. *Waterlow*[3] and *Langley* v. *Hammond*,[4] appear to have been regarded as applying merely to ways which, having never existed as *easements*, had been enjoyed *de facto* only during unity of possession by the owner of both properties for his greater convenience, the later authorities[5] being apparently explained as letting in ways which though not having existed as *easements* prior to unity of possession, had been enjoyed *de facto* during that period for the benefit of the portion severed. *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett.*

But whatever view be taken of *Thomson* v. *Waterlow* and *Langley* v. *Hammond*, and of the later decisions prior to *Bayley* v. *Great Western Railway Co.*, there now seems no reason to doubt that since the last-mentioned decision the use of general words such as "therewith used and enjoyed" and the like will, according to the intention of the parties, pass a way actually enjoyed at the time of severance, whether such way did or did not exist as of right prior to unity of possession, and whether it came into existence for the convenience of the owner of both properties, or for the benefit of the portion severed.

Thus, the question whether or not a way has passed under Question one of construction.

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[1] *Ubi sup.* at p. 455.

[2] (1881) I. L. R., 7 Cal., 665, decided prior to *Bayley* v. *Great Western Ry. Co.*, *ubi sup.*

[3] *Ubi sup.*

[4] *Ubi sup.*

[5] Those above cited and decided subsequently to *Thomson* v. *Waterlow* and *Langley* v. *Hammond*, but prior to *Bayley* v. *Great Western Ry. Co.*

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a grant, or devise, by the use of general words, still remains one of construction to be determined according to the intention of the parties as expressed in the instrument, and ascertainable from the state of circumstances existing at the date of its execution.[1]

Roe v. *Siddons.*

And this rule is not confined to ways, but is a general rule of construction.[2] In *Roe* v. *Siddons*, Lord Esher, M.R., said[3]: "In construing it" (*i.e.* the deed) "we have a right to look at "the surrounding circumstances existing at the date of the "deed, and, moreover, the words are to be construed so as to "effect the intention of the parties, which is to be gathered "from the instrument. The deed must be construed accord-"ing to the ordinary rules of construction, one of which is, "that you are entitled to look at the circumstances existing "at the date of the deed. These circumstances will give very "little help in the construction if the words of the deed "are clear, but they will help very much if the words are "ambiguous."

"*Heretofore or at any time heretofore,* used or enjoyed."

But where, owing to unity of seisin a way has been extinguished in point of law, and has no existence at the date of the instrument of severance in point of user, it is necessary to use apt words in the grant, such as "*heretofore or at any time heretofore* used or enjoyed" in order to recreate it.[4]

Necessity for comprehensive general words in Indian conveyances.

Having regard to the above state of the law, the absence of any statutory provision in India corresponding with section 6, sub-sections (1) and (2), of the Conveyancing Act, 1881, and the possibly restricted applicability (already noticed) of section 8 of the Transfer of Property Act, and section 19 of the Indian Easements Act,[5] it is necessary in Indian conveyances

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[1] *Kay* v. *Oxley* (1875), L. R., 10 Q. B. at p. 368; *Bayley* v. *Great Western Ry. Co.* (1884), 26 Ch. D. at pp. 455, 456; *Roe* v. *Siddons* (1888), 22 Q. B. D. at pp. 233, 235. And *see International Tea Stores Co.* v. *Hobbs* (1903), 2 Ch. at p. 172.

[2] *See Wardle* v. *Brocklehurst* (1859), 1 E. & E., 1058; *Roe* v. *Siddons, ibid.* at p. 233; *Quicke* v. *Chapman* (1903), 1 Ch. at p. 670; *Municipality of Poona* v. *Vaman Rayaram Gholap* (1894), I. L. R., 19 Bom., 797.

[3] *Ubi sup.* at p. 233.

[4] *See Hall* v. *Byron* (1877), 5 Ch. D., 667 (672).

[5] *See supra*, Part I. As to whether in India discontinuous easements can be claimed by a transferee on a severance of tenements as incidental to the transfer, it appears to have been suggested in *Wutzler*

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upon a severance of tenements, where rights of way are not conveyed by a specific description, to use apt general words so as to cover all possible ways.[1]

Implied grant to public bodies.

Where, as between private individuals, easements will pass by implied grant they will equally pass to a railway company or other public body in the absence of express agreement or enactment to the contrary, and such grantee will be entitled to the enjoyment of them so long as the premises in respect of which the rights are acquired continue to be used for the same purpose as they were being used at the time of the grant.[2]

Part IV.—By Presumed Grant or Operation of Law.

Distinction between "Implied Grant" and "Presumed Grant."

The distinction between what for the sake of convenience has been called an "Implied Grant" and a "Presumed Grant" has already been observed upon.[3]

In the former case, the grant is one which arises out of the intention of the grantor as expressed in the words used by

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v. *Sharpe* (1893), I. L. R., 15 All., 270 (299), that such easements might pass under and by virtue of s. 8 of the Transfer of Property Act, aided by the application of the principles of justice, equity, and good conscience as embodied in s. 6, sub-ss. (1) and (2) of the Conveyancing and Law of Property Act, 1881. But in every case it would be necessary for the claimant to produce his title in order to shew that a different intention had not been expressed or necessarily implied, *see Wutzler* v. *Sharpe, ubi sup.* Where, however, the dominant and servient tenements are held in separate ownership no difficulty would arise, as a transfer of the dominant tenement would, under and by virtue of s. 8 of the Transfer of Property Act, pass all the easements annexed thereto in the absence of a contrary intention, expressed or necessarily implied.

[1] The following words would appear to be sufficiently comprehensive (that is to say): "Together with all . . . . "ways, passages (lights, sewers, gutters, "drains), rights, easements, and appur- "tenances whatsoever to the said "hereditaments and premises or any of "them, or any part thereof belonging, "or with the same now or heretofore "held, used, occupied, or enjoyed, or "reputed or known as part or parcel "thereof, or appurtenant thereto." *See* Kay and Elphinstone's Precedents of Conveyancing, 8th Ed., Vol. I. 429, 430.

[2] *Bayley* v. *Great Western Ry. Co.* (1884), 26 Ch. D., 434. Whether such enjoyment would be permitted after the original user of the premises had ceased and they had been converted to the uses of the undertaking would depend upon the circumstances of the particular case, *Ibid.* and *see* Street on "Public Statutory Undertakings" at p. 119.

[3] *Supra*, Part III.

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him and considered with reference to the state of circumstances existing at the time of the grant, whereas, in the latter case, the grant operates not by virtue of any words used by the grantor, but by virtue of a legal presumption arising on the ground of necessity, whether absolute, or of the qualified character to be found in what are called *quasi*-easements.[1]

In cases of presumed grant the easement is said to arise as incident to the grant of the dominant tenement.[2]

It is proposed to consider these two latter classes of easements in this part of the present chapter.

A.—Acquisition of Easements of Absolute Necessity.

"Easements of Necessity."

These are the easements which are usually known as "Easements of Necessity."

The most ordinary instance of them is what is called a "way of necessity," though their application is not strictly limited to ways.[3]

How they arise.

These easements arise on a severance of tenements, whether by partition, or otherwise, on the principle that the law will presume an additional grant in favour of the grantee or a reservation in favour of the grantor of everything absolutely necessary for the enjoyment of the dominant tenement.[4]

This principle has been consistently recognised from the earliest times.[5]

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[1] In *Pheysey* v. *Vicary* (1847), 16 M. & W. (1847), at p. 495, Parke, B., conveniently distinguishes these two classes of easements by describing the first as of absolute necessity for access to property in its strict sense, and the other, according to a more modern doctrine, as necessary to the convenient enjoyment of the dwelling-house as it was enjoyed at the time of grant or devise.

[2] *Oldfield's case*, Noy's Rep., 123.

[3] *See* Chap. I, Part I, under "Easements of Necessity," and *infra*.

[4] As distinguished from a *quasi*-easement, an easement of necessity means an easement without which the property cannot be used at all, *see per* Stirling, L.J., in *Union Lighterage Co.* v. *London Graving Dock Co.* (1902), 2 Ch. at p. 573, explaining *Wheeldon* v. *Burrows* (1879), 12 Ch. D. at p. 58.

[5] *Clark* v. *Cogge* (1607), Cro. Jac., 170; *Packer* v. *Welstead* (1657), 2 Siderfin, 111; *Pomfret* v. *Ricroft* (1681), 1 Saund., 322; Wms. Notes, p. 570; *Dutton* v. *Taylor* (1701), 2 Lut., 1487; *Hinchcliffe* v. *Earl*

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In the case of a reservation the right operates by way of a re-grant from the owner of the surrounding land.[1]

In the notes to *Pomfret* v. *Ricroft*,[2] the following statement of the law occurs :— Notes to *Pomfret* v. *Ricroft*.

"So where a man, having a close surrounded with his "own land, grants the close to another in fee, for life or years, "the grantee shall have *a way* to the close over the grantor's "land as incident to the grant, for without it he cannot "derive any benefit from the grant. So it is where he grants "the land and *reserves* the close to himself."

"This principle seems to be the foundation of that species "of way which is usually called a way of necessity."

Upon this principle, a way of necessity was allowed in *Gayford* v. *Moffatt*. *Gayford* v. *Moffatt*,[3] where it was held that immediately after the lease was granted, the plaintiff, who was a tenant occupying the inner close, became entitled to a way of necessity through the outer close, suitable to the business of a wine and spirit merchant, to be carried on on the premises demised.

So in *Hinchcliffe* v. *Earl of Kinnoul*[4] there were two adjoining houses belonging to the same lessor, and the coal cellar under one house was supplied through a shoot, the mouth of which opened in the yard of the adjoining house; and it was held that a demise by the owner of both houses of the first house with its appurtenances carried with it the right to use the coal shoot, and also a right of way to the coal shoot through the premises of the adjoining house, such way being necessary for the enjoyment of the coal shoot. This decision *Hinchcliffe* v. *Earl of Kinnoul*.

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of Kinnoul (1838), 5 Bing. N. C., 1; *Dand* v. *Kingscote* (1840), 6 M. & W., 174; *Pinnington* v. *Galland* (1853), 9 Exch., 1; *Suffield* v. *Brown* (1864), 4 De G. J. & S. at p. 197; *Crossley* v. *Lightowler* (1866), L. R., 2 Ch. App., p. 486; *Gayford* v. *Moffatt* (1868), L. R., 4 Ch. App., 133; *Wheeldon* v. *Burrows* (1879), 12 Ch. D., 31 (58); I. E. Act, s. 13, cls. (*a*), (*c*), and (*e*), App. VII, and *see Chuni Lal* v. *Mani Shankar* (1893), I. L. R., 18 Bom. at p. 625; *K. Chidambara Rao* v. *Secretary of State* (1903), I. L. R., 26 Mad., 66; *Krishnamarazu* v. *Marraju* (1905), I. L. R., 28 Mad., 495; *Union Lighterage Co.* v. *London Graving Dock Co.*, *ubi sup.*

[1] *Corporation of London* v. *Rigges* (1880), 13 Ch. D., 798.

[2] 1 Saund Rep., 322; Wms. Notes, p. 570.

[3] (1868) L. R., 4 Ch. App., 133.

[4] (1838) 5 Bing. N. C., 1.

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rests on the ordinary principle of law applicable to these cases, that if a tenement is granted for valuable consideration a right of way to it through other land belonging to the grantor is also granted, if such way be absolutely necessary for the enjoyment of the thing granted.[1]

Davies v. *Sear.*

On a similar principle rests the decision in *Davies* v. *Sear*,[2] which was also a case of a right of way.

Easements of necessity may arise on a grant or reservation of minerals.

By a similar legal presumption when minerals are granted and the surface land is reserved or the surface land is granted and the minerals are reserved, such powers as are necessary for working the mines are granted or reserved, as the case may be, as incident to the grant or reservation.[3]

Dand v. *Kingscote.*

Thus in *Dand* v. *Kingscote*,[4] where land was granted with a reservation of mines and the liberty of sinking pits, it was held that the right of erecting a steam engine, and other machinery necessary for draining them, with all proper accessories, passed as incident to the reservation.

Rowbotham v. *Wilson.*

In *Rowbotham* v. *Wilson*[5] Lord Wenslevdale observed as follows :—

"The rights of the grantee to the minerals, by whomso-
"ever granted, must depend upon the terms of the deed by
"which they are conveyed or reserved when the surface is
"conveyed."

"*Primâ facie*, it must be presumed that the minerals are
"to be enjoyed, and, therefore, that a power to get them must
"also be granted or reserved, as a necessary incident. It is
"one of the cases put by Sheppard (Touchstone, 5 chap., 89)
"in illustration of the maxim, '*Quando aliquid conceditur*,
"'*conceditur etiam et id sine quo res ipsa non esse potuit*,'
"that, by grant of mines, is granted the power to dig them."

Durham Brick and Terra-Cotta Co. v. *G. W. Ry. Co.*

The same principle was followed in the recent case of

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[1] *See Suffield* v. *Brown* (1864), 4 De G. J. & S. at p. 197.

[2] (1869) L. R., 7 Eq. 427, explained in *Wheeldon* v. *Burrows* (1879), 12 Ch. D. at p. 38.

[3] *Dand* v. *Kingscote* (1840), 6 M. & W., 174; *Durham and Sunderland Railway Co.* v. *Walker* (1842), 2 Gale & Dav., 326; 2 Q. B., 940; 57 R. R., 842; *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348 (360); *Gould* v. *Great Western Deep Coal Co.* (1865), 13 L. T., 109.

[4] (1840) 6 M. & W., 174.

[5] (1860) 8 H. L. C. at p. 360.

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Ruabon Brick and Terra-Cotta Co. v. *Great Western Railway Co.*,[1] where the plaintiffs having granted land to the defendants reserving mines, and the defendant company having laid a railway over a bed of valuable clay lying in the subject of the grant, it was held that the plaintiffs were entitled to work the clay from the surface, and to remove the ballast and surface soil lying above such clay.

Easements of necessity relating to water. *Nicholas* v. *Chamberlain*.

With regard to easements relating to water, the case of *Nicholas* v. *Chamberlain*[2] has been explained as referring to a case of necessity where it was said that if a man erects a house and builds a conduit thereto from another part of his land and conveys water by pipes to the house and afterwards sells the house with the appurtenances excepting the land, or reserves the house and sells the land, the conduit and pipes pass with the house, because they are necessary and *quasi*-appendant thereto.

Ewart v. *Cochrane*.

In *Ewart* v. *Cochrane*,[3] Lord Chelmsford appears to have thought that the easement there claimed, of draining surplus water from a tanyard into a tank or cesspool, situated in the adjoining property, passed as an easement of absolute necessity on a severance of the two properties. But the tendency of the later authorities has been to recognise the acquisition of such an easement as a *quasi*-easement, apparent, continuous, and necessary for the enjoyment of the property as it was enjoyed at the time of the severance, rather than as an easement of absolute necessity.

Morgan v. *Kirby*.

So in India in *Morgan* v. *Kirby*,[4] where the easement claimed was the right to the flow of water along an artificial watercourse, it was said that such an easement might be an easement of necessity arising on a severance of tenements when the convenience claimed is one without which the grantee could not have the use of the tenement then severed off from the main heritage.

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[1] (1893) 1 Ch., 427.

[2] (1607) Cro. Jac., 121, explained in *Wheeldon* v. *Burrows* (1879), 12 Ch. D. at p. 50, *per* Thesiger, L.J.

[3] (1861) 7 Jur. N. S., 925; 4 Macq. Sc. App., 117.

[4] (1878) I. L. R., 2 Mad., 46.

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"During unity of possession no easement strictly so called "exists, but a man may, by the general right of property, "make one part of his property dependent on another and "grant it with this dependence to another person. Where "property is conveyed which is so situated relatively to that "from which it has been severed so that it cannot be enjoyed "without a particular privilege in or over the land of the "grantor, the privilege is what is called an easement of necessity, "and the grant of it is implied and passes without any express "words. It is, as it were, brought into existence by the sever- "ance of the tenements on the principle that together with the "property sold, the vendor grants everything, without which "it could not be beneficially used."[1]

Similarly the right to the flow of water along a drain may be acquired as an easement of necessity.[2]

Tenant may acquire easement of necessity against landlord. *Gayford* v. *Moffatt*.

The rule preventing a tenant from acquiring an easement by prescription as against his landlord does not extend to the case of an easement of necessity, as the case of *Gayford* v. *Moffatt*,[3] above cited, shews.

Distinction between easements of absolute necessity and *quasi*-easements where dominant tenement retained by grantor.

Though easements of absolute necessity and *quasi*-easements may alike be created by implication of law on a severance of the tenements, a point of distinction arises between these two classes of easements in cases where the dominant tenement is retained by the grantor instead of being conveyed, and it is the servient tenement which is conveyed to the grantee.

In such circumstances the legal presumption operates for the acquisition of an easement of absolute necessity, as much in favour of the grantor retaining the dominant tenement as of the grantee obtaining it, the necessity, which is the foundation of the easement, being considered equally present in either case:

But with regard to *quasi*-easements it will be seen that in Bengal and those parts of India where the Indian Easements Act is not in force, these rights do not (subject to certain

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[1] *Ibid.*, *per* Innes, J., at p. 52.

[2] *Purshotam* v. *Tukaram* (1890), I. L. R., 14 Bom., 452.

[3] (1868) L. R., 4 Ch. App., 133.

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exceptions) arise in favour of a grantor retaining the dom nant tenement and conveying the servient tenement, by virtue of a similar presumption of law, but only by express reservation in the conveyance.[1]

B.—Acquisition of Quasi-Easements.

What are *quasi*-easements.

The term "*quasi*-easements" has been applied to those easements which, not being easements of absolute necessity, come into existence for the first time by presumed grant or operation of law on a severance of two or more tenements formerly united in the sole or joint possession or ownership of one or more persons.[2]

They are to be distinguished from those easements which, existing before the unity of possession, are suspended merely during its continuance, and revive upon its determination by the mere separation of the tenements.[3]

Though possessing no legal existence during the unity of possession or ownership, their use during that time by the owner of the united tenements as necessary to the enjoyment of the property, causes them to be regarded in law as *quasi*-appendant rights expanding into easements proper on a disposition of the tenements.

How distinguishable from easements of absolute necessity.

Though in one sense they may be called easements of necessity as originating partly in reasons of practical utility, they offer important features of dissimilarity to easements of absolute necessity, both in the matter of their acquisition by a grantor retaining the *quasi*-dominant tenement, and in their character of being apparent and continuous.[4]

Their acquisition to be considered from three different aspects.

It will be convenient to consider from three different aspects the law relating to the acquisition of *quasi*-easements

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[1] *See infra* B, Acquisition of *Quasi*-Easements.

[2] They will not, of course, come into existence where the terms of the conveyance exclude them, *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 809, or where they would be inconsistent with the implied intention of the parties, *see infra* under "Limitation of the General Rule."

[3] *See Suffield* v. *Brown* (1864), 4 De G. J. & S., 185; and Chap. X, Part II.

[4] *See supra*, this matter is referred to under "Acquisition of Easements of Absolute Necessity" and *infra*, where it is fully discussed.

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on a severance of tenements: *first*, where the tenements were formerly united in *sole* possession or ownership; *secondly*, in reference to the exceptions to the general rule against presumed reservation; and *thirdly*, where they were formerly united in *joint* possession or ownership and are severed on partition.

I.—Acquisition of quasi-easements on a severance of tenements formerly held in sole possession or ownership.

In cases falling under this heading the question whether *quasi*-easements arise on a severance of the tenements depends upon whether the *quasi*-dominant tenement is conveyed to the grantee or retained by the grantor, for though in the former event, *quasi*-easements arise in favour of the grantee under a presumed additional grant, they are not in the latter event (according to the general rule which is subject to certain exceptions) retained by the grantor, except by express words of reservation. This distinction makes it necessary to consider the law, first, when the *quasi*-dominant tenement is conveyed, and secondly, when it is retained.

(a) *The law as to the acquisition of quasi-easements when the quasi-dominant tenement is conveyed to the grantee, and the quasi-servient tenement is retained by the grantor.*

(1) *Generally.*

General principles.

It will be convenient in the first instance to state general principles, and then to refer in detail to the different kinds of easements to which such principles have been applied.

Such general principles may be stated as follows:—

First.—On the grant by the owner of an entire property of part of that property as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements, meaning *quasi*-easements, which are necessary to the reasonable enjoyment of the property granted, and which have

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been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted.[1]

Secondly.—Such easements arise in favour of the grantee either on the principle that the grantor is presumed by law to grant everything which is essential to the use and enjoyment of the *quasi*-dominant tenement, or on the principle that a man cannot derogate from his own grant.[2]

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[1] *Suffield* v. *Brown* (1864), 4 De G. J. & S., 185; *Watts* v. *Kelson* (1870), L. R., 6 Ch. App., 166; *Amutool Russool* v. *Jhoomuck Singh* (1875), 24 W. R., 345 (Civil Rulings), *Wheeldon* v. *Burrows* (1878), 12 Ch. D., 31; *Allen* v. *Taylor* (1880), 16 Ch. D., 355; *Russell* v. *Watts* (1885), 10 App. Cas., 611; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., at p. 853; *Purshotum* v. *Durgoji* (1890), I. L. R., 14 Bom., 452; *Chunilal* v. *Manishankar* (1893), I. L. R., 18 Bom., 616; and *see* Norton on Deeds (1906), pp. 268 *et seq*. The same rule applies in favour of a lessee of the *quasi*-dominant tenement either as against the lessor retaining the *quasi*-servient tenement or his assigns. *Cox* v. *Matthews* (1685), 1 Ventris, 237, 239; *Roswell* v. *Pryor* (1704), 6 Mod., 116; *Coutts* v. *Gorham* (1829), M. & M., 396; *Davies* v. *Marshall* (1861), 1 Dr. & Sm., 557; *Jacomb* v. *Knight* (1863), 32 L. J. Ch., 601; *Cable* v. *Bryant* (1908), 1 Ch., 259. It applies also in the case of a sale by a mortgagee rightly exercising his power of sale, *Born* v. *Turner* (1900), 2 Ch., 211. It applies equally to a grant by a railway company except in so far as a right of possible obstruction is reserved, *Myers* v. *Catterson* (1889), 43 Ch. D., 470.

[2] *Suffield* v. *Brown*; *Wheeldon* v. *Burrows*; *Allen* v. *Taylor*; *Chunilal* v. *Atmaram*, *ubi sup*. As between grantor and grantee the same result may be obtained by means of an implied covenant for quiet enjoyment, *see supra*, Part I, under "Implied covenant for quiet enjoyment." By the application of the doctrine of non-derogation the grant of an easement may be presumed from the purpose for which the grant of the *quasi*-dominant tenement is made, whether such purpose is stated in the grant or is known to the grantor independently, *Robinson* v. *Grace* (1873), 21 W. R., 223; 27 L. T. N. S., 648. Thus, in the case last cited, a grantor of land for the purpose of a house being built upon it, was held entitled to an easement to such extent as might be necessary to enable him to build the house and enjoy it when built. In *Siddons* v. *Short* (1877), L. R., 2 C. P. D., 572, the grant of an easement of support was presumed on the ground that where a grantor of land knows that substantial buildings are intended to be erected upon it, he impliedly engages so to use his adjoining land as not to injure or interfere with those buildings. In *Aldin* v. *Latimer, Clark, Muirhead & Co.* (1894), 2 Ch., 437 it was decided on the same principle, that the plaintiff was entitled by implied grant to the access of so much air to his drying sheds as was necessary for the ordinary purposes of his business as a timber merchant. To the same effect is the decision in *Cable* v. *Bryant* (1908), 1 Ch., 259, where the defendant was restrained upon similar principles from obstructing the access of light and air to the plaintiff's stable. So, too, on the grant of a divided moiety of a party-wall, there will arise by implication of law all such easements as are reasonably necessary for the purpose of giving effect to the intention of the parties with regard

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The former principle applies in the case of an affirmative easement under a presumed additional grant.[1]

The latter principle applies in the case of a negative easement under a presumed negative covenant.[2]

The justice of these principles is unquestionable, for it is obvious that where one portion of a united property has been dependent on another portion for certain necessary advantages, and the former portion is alienated, the denial to the grantee of the enjoyment of similar advantages would be to deprive his newly acquired property of utility, and him of the benefit of his bargain. Not only would such denial work injustice to the grantee, but would shew undue favour to the grantor by allowing him to retain his consideration without making an adequate return.

Uniformly recognised in England and in India.

These principles are well established in English law, and have received uniform recognition in India, both in the Indian Easements Act itself,[3] and from the Courts in cases falling under and outside that Act.[4]

Limitation of the general rule.

It should, however, be observed that the general rule must be taken with this limitation, that, on a severance of tenements, the grantee of the dominant tenement will not be

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to the user of the wall, *Jones* v. *Pritchard* (1908), 1 Ch., 630; 24 Times L. R., 309. The same doctrine has been applied in favour of a railway company or local authority acquiring land under their compulsory powers, to the extent of giving them a right by implication to all easements necessary to the reasonable enjoyment of the land, having regard to the purposes of the acquisition, *Caledonian Ry. Co.* v. *Sprot* (1856), 2 Macq., 449; *Elliott* v. *N.-E. Ry. Co.* (1863), 10 H. L. C., 333; *Scott* v. *Acton Local Board* (1886), 31 Ch. D., 679. So, too, where powers are given by statute to public bodies for a special purpose, there is also an implied grant of all such easements as are reasonably necessary to effectuate such purpose, *Benfieldside Local Board* v. *Consett Iron Co.* (1887), 3 Exch. Div., 54; *In re Corporation of Dudley* (1881), 8 Q. B. D. 86; *London and N.-W. Ry. Co.* v. *Evans* (1893), 1 Ch., 16. But the doctrine cannot be invoked to protect some special or extraordinary user by the grantee of the property granted when the grantor did not, and could not, know that the property would be used for such a purpose, *Robinson* v. *Kilvert* (1889), 41 Ch. D., 88.

[1] *Dalton* v. *Angus* (1881), 6 App. Cas., 78?.

[2] *Ibid.*

[3] S. 13, cl. (*b*), App. VII; *Raja Suranani Papayya Rau* v. *Secretary of State* (1903), I. L. R., 26 Mad., 51.

[4] *Morgan* v. *Kirby*; *Delhi and London Bank* v. *Hem Lall Dutt*; *Purshotam* v. *Durgoji*; *Chunilal* v. *Manishankar*, *ubi sup.*

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entitled to any apparent and continuous easement which would be inconsistent with the intention of the parties to be implied from the circumstances existing at the time of the grant and known to the grantee.[1]

Thus, the presumption will be modified if the grantee has notice that the remaining land is intended to be used for a particular purpose, as where a house with lights is conveyed to the grantee in pursuance of an agreement which also provides for the adjoining land being built upon,[2] or where there is a conveyance of a building "with the rights, members, and appurtenants to the said premises belonging," and the grantee knows that the adjoining land is being laid out for building,[3] or where in the conveyance of a house with lights by a railway company there is a recital that the remainder of the land will be required by them for the construction of their railway.[4]

But subject to such user of the adjoining property as was agreed or contemplated at the time of the grant, the grantee will be entitled to the full enjoyment of the easement.[5]

The rights to be enjoyed with a house to be built must be determined not at the time of the conveyance of the house and land, but at the time of the contract for the purchase of the site.[6]

(2) *In Particular.*

(*a*) Easements of Light and Air.

Pass as *quasi*-easements.

The general principles above stated are applicable to the acquisition of easements of light and air by presumed grant. Thus, when such easements pass to a grantee on a severance

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[1] *Birmingham, etc., Co.* v. *Ross* (1888), 38 Ch. D., 295; *Godwin* v. *Schweppes, Ltd.* (1902), 1 Ch., 926; *Phillips* v. *Low* (1892), 1 Ch. 49 (51), which was the case of a devise. *See* also *Myers* v. *Catterson* (1889), 43 Ch. D., 470 (477), (478), (482), (483).

[2] *Godwin* v. *Schweppes, Ltd.*, *ubi sup.*

[3] *Birmingham, etc., Co.* v. *Ross*, *ubi sup.*

[4] *Myers* v. *Catterson*, *ubi sup.*

[5] *Myers* v. *Catterson*, *ubi sup.*; *Wilson* v. *Queen's Club* (1891), 3 Ch., 522.

[6] *Broomfield* v. *Williams* (1897), 1 Ch., 602 (616); *Pollard* v. *Gare* (1901), 1 Ch., 834; *Godwin* v. *Schweppes, Ltd.* (1902), 1 Ch., 926 (932).

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of the tenements they pass as *quasi*-easements, and not as easements of necessity.[1]

With this preliminary observation it is proposed to examine the authorities in detail.

Palmer v. *Fletcher*.

One of the earliest reported cases is that of *Palmer* v. *Fletcher*,[2] where it was resolved that if a man erects a house on his own land and thereafter sells the house to one purchaser and the land to another, the purchaser buying the land cannot block up the other's lights any more than the original owner, who cannot derogate from his own grant, and this though the house is a new one.

To the same effect are the decisions in *Cox* v. *Matthews*,[3] and *Rosewell* v. *Pryor*.[4]

Compton v. *Richards*.

Palmer v. *Fletcher* was followed in *Compton* v. *Richards*,[5] where it was held that the occupier of one of two houses built nearly at the same time and purchased by the same proprietor, might maintain a special action on the case against the tenant of the other for obstructing his window lights, however short the previous enjoyment by the plaintiff.

Though the houses were unfinished at the time of sale, the openings intended for the windows were sufficiently indicated to support an implied condition that nothing should be afterwards done whereby the windows might be obstructed.

Coutts v. *Gorham*.

In *Coutts* v. *Gorham*,[6] the owner of two adjoining houses having certain ancient windows leased one of them for twenty-one years determinable on lives, which lease the lessee afterwards assigned to the defendant.

Subsequently the defendant took a new lease of the same premises from the owner for twenty-one years.

The windows of the other house had been altered and placed in a different position from the ancient ones at a period within twenty years before the obstruction of lights complained

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[a] *Wheeldon* v. *Burrows* (1878), 12 Ch. D., 31; *Chunilal* v. *Manishankar* (1893), I. L. R., 18 Bom., 616, and *see* Indian Easements Act, s. 13, cl. (*b*), and ill. (*c*), App. VII.

[2] (1679) 1 Levinz, 122.

[3] (1685) 1 Ventr., 237.

[4] (1704) 6 Mod., 116.

[5] (1814) 1 Price, 27.

[6] (1829) 1 Moody and Malkin, 396.

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of by the plaintiff, and the owner afterwards leased the house to the plaintiff.

It was held that as the owner could not have obstructed the plaintiff's lights in these circumstances, the defendant had not the right to do so.

The same principle was applied in *Swansborough* v. *Coventry*,[1] where Tindal, C.J., said: "It is well established by the "decided cases, that where the same person possesses a house, "having the actual use and enjoyment of certain lights, and "also possesses the adjoining land, and sells the house to "another person, although the lights be new, he cannot, nor "can any one who claims under him, build upon the adjoining "land so as to obstruct or interrupt the enjoyment of those "lights. The principle is laid down by Twisden and Wynd- "ham, JJ., in the case of *Palmer* v. *Fletcher*, 'that no man "'shall derogate from his own grant.' The same law was "adhered to in the case of *Cox* v. *Matthews*, by Holt, C.J.; "in *Rosewell* v. *Pryor*; and, lastly, in the later case of "*Compton* v. *Richards*." *Swansborough v. Coventry.*

In *Wheeldon* v. *Burrows*,[2] the general rule governing the acquisition of *quasi*-easements by the grantee of the *quasi*-dominant tenement was stated to be applicable to easements of light and to be founded on the maxim well established by authority and consonant to reason and common-sense, that a grantor shall not derogate from his own grant, and was expressed as follows:— *Wheeldon v. Burrows.*

"On the grant by the owner of a tenement of part of that "tenement as it is then used and enjoyed, there will pass to "the grantee all those continuous and apparent easements "(meaning *quasi*-easements), or, in other words, all those "easements which are necessary to the reasonable enjoyment "of the property granted, and which have been and are at "the time of the grant used by the owners of the entirety for "the benefit of the part granted."[3]

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[1] (1832) 9 Bing., 305.

[2] (1879) 12 Ch. D., 31.

[3] *Per* Thesiger, L. J., at p. 49.

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Allen v. *Taylor*.

In *Allen* v. *Taylor*[1] Jessel, M.R., said: "There can be no "doubt that the law as laid down by *Palmer* v. *Fletcher* is the "law of the present day; that is, where a man grants a house "in which there are windows, neither he nor anybody claiming "under him can stop up the windows or destroy the lights. "That is based on the principle that a man shall not derogate "from his own grant; and it makes no difference whether he "grants the house simply as a house, or whether he grants the "house with the windows or the lights thereto belonging. In "both cases he grants with the apparent easements or *quasi*-"easements. All that is now, I take it, settled law."

Broomfield v. *Williams*; *Pollard* v. *Gare*.

Finally, the recent cases of *Broomfield* v. *Williams*[2] and *Pollard* v. *Gare*[3] have affirmed the same doctrine by deciding that the purchaser or lessee of the first of a series of building plots is entitled to the free access of light to his house, unless the vendor or lessor has expressly reserved to himself and his assigns a right to obstruct by building on the adjoining land or there is sufficient evidence of a definite building scheme binding on the purchaser or lessee.[4] And the burthen of modifying or displacing the presumption lies on the grantor.[5]

The successive decisions above cited establish beyond question the principles of English law which govern the acquisition of *quasi*-easements of light by the grantee of the *quasi*-dominant tenement.

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[1] (1880) 16 Ch. D. at p. 357.

[2] (1897) 1 Ch., 602.

[3] (1901) 1 Ch., 834.

[4] Reference in the conveyance and the plan thereon to "building land" and the existence of a building line in the plan, by reference to which the agreement of sale or lease is entered into, without anything further, are insufficient to restrict the application of the doctrine, *Broomfield* v. *Williams*; *Pollard* v. *Gare*. But express agreement (*Haynes* v. *King* (1893), 3 Ch., 439), or circumstances existing at the time of the grant clearly inconsistent with the easement and known to the grantee or devisee (*Birmingham, etc., Co.* v. *Ross* (1888), 38 Ch. D., 295; *Godwin* v. *Schweppes, Ltd.* (1902), 1 Ch., 926; *Phillips* v. *Low* (1892). 1 Ch., 47), can displace or modify the presumption, *see* also *Myers* v. *Catterson* (1889), 43 Ch. D., 470. But since, on a severance of tenements, there is *primâ facie* a right to the free access of light in favour of the grantee, the burden of setting limits to it lies on the grantor. *Broomfield* v. *Williams*, *ubi sup.* at pp. 610, 613.

[5] *Broomfield* v. *Williams*, *ubi sup.* at pp. 610, 613.

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In India the same rule has, in its application to easements of light, received legislative and judicial approval.[1]

English principles applied in India.

The maxim that a grantor may not derogate from his own grant has been applied to a case of air under circumstances which, though otherwise precluding the acquisition of the easement, were on this ground held to entitle the grantee to relief.

Easements of air.

In *Aldin* v. *Latimer Clark, Muirhead & Co.*,[2] the plaintiff was the lessee of land demised to him for the purpose of carrying on the business of a timber merchant, and in the lease had covenanted to carry on such business. The defendants, who were assigns of the lessor, erected buildings on adjoining land acquired by them from him, and by so doing interfered with the access of air to sheds upon the demised property used for drying timber. It was held that they were not entitled so to do, inasmuch as in accordance with the general rule that a grantor may not derogate from his own grant, the lessor and the defendants, as his assigns, subject to the existing lease, were under an obligation to abstain from doing anything on the adjoining property which would prevent the land demised from being used for the purpose for which the demise was made.

Aldin v. *Latimer Clark, Muirhead & Co.*

(*b*) Easements relating to Water.

The same general principles are applicable to the acquisition of *quasi*-easements relating either to the artificial flow of water to or from the *quasi*-dominant tenement or to the pollution of water.

May also pass as *quasi*-easements.

Thus, in regard to the artificial flow of water to the *quasi*-dominant tenement it was held in *Nicholas* v. *Chamberlain*[3] by all the judges upon demurrer that if one erects a house and builds a conduit thereto from another part of his land and conveys water by pipes to the house and afterwards sells

Quasi-easements in artificial flow of water to dominant tenement.

Nicholas v. *Chamberlain*.

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[1] I. E. Act, s. 13, cl. (*b*) and ill. (*c*); *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal. at p. 853.

[2] (1894) 2 Ch., 437.

[3] (1607) Cro. Jac., 121

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the house with the appurtenances excepting the land, the conduit and pipes pass with the house, because they are necessary and *quasi*-appendant thereto.

Sury v. *Piggott.*

In *Sury* v. *Piggott*[1] an action was brought for obstructing a stream of water running over the defendant's land to a pool of the plaintiff's situate in a close which was part of the plaintiff's rectory. The land over which the stream flowed and the plaintiff's close had both belonged in unity of ownership to the Crown until King Henry VIII. granted the land over which the stream flowed to the grantee under whom the defendant claimed.

It was held that the defendant took the land subject to the previously existing right of the plaintiff's predecessors to have the flow of water to the pool unobstructed.

In the same case it was laid down that if a man has a mill on one part of his land, and the stream which works the mill flows through another part of his land, and he grants the mill with the land on which it stands, he cannot afterwards stop the stream from flowing to the mill through the part of the land which he has not granted.

Canham v. *Fisk.*

In *Canham* v. *Fisk*[2] the owner of two closes, in one of which a stream arose that flowed through the other, first sold the latter to the plaintiff and afterwards sold the former to the defendant. In an action by the plaintiff for the diversion of the water by the defendant it was held that a presumed right to the water passed with the conveyance to the plaintiff, and that the action could be maintained.

Watts v. *Kelson.*

Watts v. *Kelson*[3] is a later and an important decision in favour of the acquisition of *quasi*-easements in the artificial flow of water to the *quasi*-dominant tenement, and it explains the meaning of the words "centinuous" and "necessary" in reference to *quasi*-easements.

In that case the plaintiff sued to maintain an alleged right to the uninterrupted flow of water along an artificial watercourse through the defendant's premises to the plaintiff's.

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[1] (1625) Palmer, 444.
[2] (1831) 2 C. & J., 126.
[3] (1870) L. R., 6 Ch. App., 166.

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The facts were that the owner of two properties held in unity of ownership made a drain from a tank on one property to a lower tank on the same property, and laid pipes from the lower tank to cattle-sheds on the other property for the purpose of supplying them with water, and they were so supplied up to the time the owner sold the latter property to the plaintiff who then had the use of the water until the defendant, who subsequently became the purchaser of the former property, stopped it.

In granting a perpetual injunction restraining the defendant from obstructing and diverting the stream and watercourse, the Court of Appeal, in a judgment delivered by Mellish, L.J., made the following observations:—

"We are clearly of opinion that the easement in the "present case was in its nature continuous. There was an "actual construction on the servient tenement extending to the "dominant tenement by which water was continuously brought "through the servient tenement to the dominant tenement for "the use of the occupier of the dominant tenement. Accord-"ing to the rule, as laid down by Chief Justice Erle, the right "to such an easement as the one in question would pass by "implication of law without any words of grant, and we think "that this is the correct rule." [1]

"It was objected before us, on the part of the defendant, "that on the severance of two tenements no easement will pass "by an implied grant, except one which is necessary for the "use of the tenement conveyed. It was, at the time of the "conveyance, the existing mode by which the premises con-"veyed were supplied with water; and we think it is no "answer that if this supply was cut off, possibly some other "supply might have been obtained. We think it is proved "on the evidence that no other supply of water equally "convenient or equally pure could have been obtained." [2]

In *Ramessur Prasad Narain Singh* v. *Koonj Behari Pattuk*,[3] *Ramessur Prasad Narain Singh* v. *Koonj Behari Pattuk.*

[1] P. 173.
[2] P. 175.
[3] (1878) 4 App. Cas. at p. 128; I. L. R., 4 Cal. at p. 639; L. R., 6 Ind. App. at pp. 40, 41.

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where the plaintiff claimed for the purposes of irrigation to have the flow of water in an artificial channel from the defendant's estate to his own without diversion by the defendant, the Privy Council, referring to *Watts* v. *Kelson*, observed, "It "may be that at the time when this system of irrigation was "adopted the *mouzahs* now belonging to the plaintiff and the "defendant formed one estate, and, if so, on severance the "right to the continued flow of water in the accustomed "channels would arise and subsist."

Morgan v. Kirby.

In *Morgan* v. *Kirby*,[1] where the easement claimed was the flow of water along an artificial watercourse, it was said that such an easement might be acquired as a *quasi*-easement in the character of being a continuous and apparent easement which has been used by the owner during the unity of possession for the purpose of that part of the united tenement which corresponded with the tenement conveyed.

Raja Suraneni Venkata Papayya Rau v. Secretary of State.

Similarly in *Raja Suraneni Venkata Papayya Rau* v. *Secretary of State*,[2] Government having purchased certain villages at a sale for arrears of Government revenue, it was held that it had acquired an easement under section 13 (*b*) of the Indian Easements Act,[3] to have the lands in such villages irrigated from the same source of irrigation in another village belonging to the same zemindari as had been in use at the time of the sale.

Same law with regard to *jus aquæ educendæ*.

As regards the easement to discharge water on to another's land, the *jus aquæ educendæ* of the Civil Law, there are cases deserving attention.

Coppy v. *J. de B.*

The first of these is the old case of *Coppy* v. *J. de B.* decided in the 11 H. 7 and reported in Gale on Easements as follows[4]:—

"One William Coppy brought an action in the case against "J. de B., and counted that according to the custom of London, "where there are two tenements adjoining, and one had a "gutter running over the tenement of the other, the other

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[1] (1878) I. L. R., 2 Mad., 46. *See* also *Amutool Russool* v. *Jhoomuck Singh* (1875), 24 W. R., 345 (Civ. Rul.).

[2] (1903) I. L. R., 26 Mad., 51.

[3] *See* App. VII.

[4] 8th Ed., pp. 117 *et seq.*

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"cannot stop it, though it be on his own land; and counted "how he had a tenement and the defendant another tenement "adjoining. The defendant's counsel said, 'We say that since "'the time of memory one *A* was seized of both tenements "'and enfeoffed the plaintiff of the one and defendant of the "'other.' To which it was replied, 'This is not a good plea, "'for the defendant seeks to defeat the custom by reason of an "'unity of possession since the time of memory; and that he "'cannot do in this case, for such a custom, that one shall "'have a gutter running to another man's land is a custom "'solemnly binding the land, and this is not extinct by unity "'of possession; as if the lord of a seigniory purchased lands "'held in gavelkind, the custom is not thereby extinguished, "'but both his sons shall inherit the lands, for the custom "'solemnly bindeth the lands.' Townshend said, 'If a man "'purchase land of which he hath the rent, the rent is gone by "'the unity of possession, because a man cannot have a rent "'from himself, but if a man hath a tenement from which a "'gutter runneth into the tenement of another, even though "'he purchased the other tenement, the gutter remains and is "'as necessary as it was before.' To this it was objected by "the defendant's counsel, 'That he who was the owner of the "'two tenements might have destroyed the gutter; and that if "'he had done so, and then made several feoffments of the "'two tenements, the gutter could not have revived.' To "'which it was replied, 'If that were so, you might have "'pleaded such destruction specially, and it would have raised "'a good issue. 11 H. 7, 25, pl. 6.'"

Though the plaintiff rested his case on a custom of London, the decision appears to be equally founded on general principles.

In *Ewart* v. *Cochrane*[1] there were two adjoining properties, one a tanyard and the other a house and garden, which formerly belonged to the same owner. *Ewart* v. *Cochrane*.

During unity of possession a drain was made from the

[1] (1861) 7 Jur. N. S., 925; 4 Macq. Sc. App., 117.

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tanyard to a cesspool in the garden for the purpose of carrying off the surplus water.

Subsequently the tanyard was conveyed to the respondent's predecessor in title, without any mention of the drain but with the words "as the whole said subjects are previously possessed by us," and the house and garden was afterwards conveyed to the appellant.

The latter being annoyed by the cesspool, blocked up the drain, and the respondent thereupon brought an action for damages which the Court of Session decided in his favour, on the ground that there had been a presumed grant of an easement to discharge the water from the tanyard into the cesspool.

This decision was affirmed by the House of Lords.

Lord Campbell appears to have made no distinction in his judgment between apparent and continuous easements and discontinuous easements, and the words "comfortable enjoyment" which he there makes use of seem too broad and vague an expression for the qualified necessity which is one of the conditions of a *quasi*-easement.[1] Lord Chelmsford appears to have based his concurrence in the decision of the House on the ground of absolute necessity.

Purshotam Sakharam v. *Durgoji Tukaram*.

In *Purshotam Sakharam* v. *Durgoji Tukaram*,[2] the plaintiff and defendant were in joint possession of certain land. They partitioned the land and subsequently built at their joint expense a partition wall between their respective portions, leaving a drain in the wall for the passage of water from the plaintiff's to defendant's land.

Thereafter the defendant stopped the flow of water of this drain and the plaintiff sued for an injunction restraining the defendant from causing the obstruction. It was held that the plaintiff would be entitled to the easement claimed by him if he could shew either that it was necessary for his share of the property or that it was apparent and continuous and necessary for enjoying the share as it was enjoyed when the partition took effect.

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[1] *Supra*, Part IV, B, I (*a*) (1).

[2] (1890) I. L. R., 14 Bom., 452.

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Section 13 (*b*) of the Indian Easements Act read with illustration (*h*) to the same section provides for the acquisition of easements in the artificial flow and discharge to and from the dominant tenement upon a severance of tenements.[1]

Indian Easements Act, s. 13 (*b*), and ill. (*h*)

Lastly, there is the easement to pollute water.

Easement to pollute water.

An authority for the acquisition of this right as a *quasi*-easement by presumed grant, is the case of *Hall* v. *Lund*.[2]

Hall v. *Lund*.

There the owner of two mills leased one to the defendant. In the lease he was described as a bleacher, and the mill leased as lately occupied by one Pullan. Pullan had formerly carried on the business of a bleacher in the same mill and drained the refuse of his works into a watercourse which supplied the other mill. The lessor subsequently sold both mills to the plaintiff who sued the defendant for polluting the watercourse with the drainage from his bleaching works to the injury of the other mill.

The action failed as there was found to be an implied grant to the defendant to use the watercourse for the purposes of his business as a bleacher.

Pollock, C.B., and Channell and Wilde, BB., rested their decision on the double ground of a grant to the defendant of a continuous and apparent easement to pollute, and of non-derogation, whilst Martin, B., in agreeing that the plaintiff could not succeed, preferred to base his judgment on the principle of *Ewart* v. *Cochrane*.[3]

(*c*) Easement to pollute air.

The same principles of acquisition are applied by the Indian Easements Act to the case of an easement to pollute air.[4]

(*d*) Easements of support.

Easements of support, that is, easements of the support of a house by land, or of a house by a house, furnish a

Application of general principles.

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[1] *See* App. VII.

[2] (1863) 1 H. & C., 676.

[3] *Ubi sup.*

[4] S. 13 (*b*), ill. (*g*), App. VII.

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further example of the application of the general principles governing the acquisition of *quasi*-easements by the grantee of the *quasi*-dominant tenement.[1]

Support to house by house or land.

It is well established that on a severance of tenements the grantee of a house, or of land sold for the purpose of being built upon, will acquire by presumption of law an easement of support for his house built or to be built, from the adjoining portions of the severed property.[2]

Angus v. *Dalton.*

Thus, in *Angus* v. *Dalton*, Cockburn, C.J., said[3]: "Where "land has been sold by the owner for the express purpose of "being built upon, or where, from other circumstances, a grant "can reasonably be implied, I agree that every presumption "should be made and every inference should be drawn in "favour of such an easement, short of presuming a grant "when it is undoubted that none has ever existed."

Dalton v. *Angus.*

And in the same case when it was before the House of Lords as *Dalton* v. *Angus*, Lord Chancellor Selborne said[4]: "If at the time of the severance of the land from that of the "adjoining proprietor it was not in its original state, but had "buildings standing on it up to the dividing line, or if it were "conveyed expressly with a view to the erection of such build-"ings, or to any other use of it which might render increased "support necessary, there would be an implied grant of such "support as the actual state or the contemplated use of the "land would require, and the artificial would be inseparable "from, and (as between the parties to the contract) would be

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[1] There is a corresponding doctrine of presumed reservation in favour of a grantor who grants the *quasi*-servient house and retains the *quasi*-dominant house, such doctrine being an exception to the general rule of express reservation, *see* further, *infra*.

[2] *Richards* v. *Rose* (1853), 9 Exch., 218; 23 L. J. Exch., 3; *Gayford* v. *Nicholls* (1854), 9 Exch. at p. 708; 23 L. J. Exch., 205; *Caledonian Ry. Co.* v. *Sprot* (1857), 2 Macq. 449; *N.-E. Ry. Co.* v. *Elliott* (1860), 1 J. & H., 145 (153); *Suffield* v. *Brown* (1864), 4 De G. J. and S. at p. 198; *Angus* v. *Dalton* (1877), 3 Q. B. D. at p. 116; *Siddons* v. *Short* (1877), 2 C. P. D., 572; *Angus* v. *Dalton* (1878), 4 Q. B. D. at p. 182; *Wheeldon* v. *Burrows* (1879), 12 Ch. D. at p. 59; *Dalton* v. *Angus* (1880), 6 App. Cas. at pp. 792, 826; *Rigby* v. *Bennett* (1882), 21 Ch. D., 559; *Jones* v. *Pritchard* (1908), 1 Ch., 630 (635, 636); 24 Times L. R., 309 (310); I. E. Act, s. 13 (*b*), ills. (*i*) and (*j*), App. VII.

[3] (1877) 3 Q. B. D. at p. 116.

[4] (1881) 6 App. Cas. at p. 792.

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"a mere enlargement of, the natural. If a building is divided "into floors or 'flats' separately owned (an illustration which "occurs in many of the authorities), the owner of each floor "or 'flat' is entitled upon the same principle, to vertical "support from the lower part of the building, and to the "benefit of such lateral support as may be of right en- "joyed by the building itself: *Caledonian Railway Co.* v. *Sprot.*"[1]

On the same occasion, Lord Blackburn said[2]: "But I think "it is now established law that one who conveys a house does, "by implication and without express words, grant to the vendee "all that is necessary and essential for the enjoyment of the "house, and that neither he nor any who claim under him, "can derogate from the grant by using his land so as to injure "what is necessary and essential to the house."

Support to house by party-wall.

On the same principle, the grantee of a divided moiety of a party-wall is entitled to an easement of lateral support from the other divided moiety of the wall for the benefit of the roof of the house which it is contemplated by the parties to the grant the grantee shall build on the moiety of the wall comprised in the grant.[3]

Siddons v. *Short*.

In *Siddons* v. *Short*,[4] the plaintiffs who were ironfounders and had bought land from the defendant's assignor for the purpose of erecting an iron foundry upon it to the knowledge of the latter, sued the defendant, their vendor's lessee, to restrain him from working the minerals in the adjoining land leased to him in such a way as to cause any subsidence or alteration of their land. An injunction was granted on the principle that a vendor of land adjoining other land of his own, who knows at the time of sale that buildings are to be erected on the purchased lands enters into an implied covenant that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant.

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[1] (1857) 2 Macq., 449. *See* I. E. Act, s. 13, ill. (*m*), App. VII.

[2] At p. 826.

[3] *Jones* v. *Pritchard* (1908), 1 Ch., 630 (635, 636); 24 Times L. R., 309 (310).

[4] (1877) 2 C. P. D., 572.

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(*e*) Easements of Way.

General principles not applicable.

The general principles which obtain regarding the acquisition of *quasi*-easements by presumption of law do not apply to easements of way. The reason for this exception lies, as has been already observed, in the distinction which is made between discontinuous easements, that is, easements used from time to time merely, such as rights of way, other than ways of necessity, and continuous easements, such as easements of light and others, which fall within the category of *quasi*-easements.[1]

When easements of way do pass by presumption of law, it is only as ways of necessity arising in favour of grantor or grantee alike on a severance of the tenements.

In all other cases, rights of way, when passing by implication, do so only under an implied grant, as already defined and discussed.[2]

Charu Surnokar v. *Dokouri Chunder Thakoor* at variance with English principles.

This on the authorities appears to be so clearly established a distinction that it would not be necessary again to refer to it were it not for the decision in the case of *Charu Surnokar* v. *Dokouri Chunder Thakoor*,[3] which, if it is to be considered as the law in Bengal, marks a serious departure from English principles in more respects than one.

In that case the easement in question was a right of way claimed by the defendant in answer to the plaintiff's action for a perpetual injunction restraining the defendant from using a path which ran over the plaintiff's land.

The land held by the plaintiff and defendant originally belonged to the same owner, the plaintiff and defendant having obtained their respective tenements more than twenty years previously to suit. The path had been admittedly made by the original owner, but the plaintiff contended that when he purchased the land he had closed the path. This the Munsif disbelieved and refused the injunction.

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[1] *Supra*, Part III, "By Implied Grant."

[2] *Supra*, Part III, "Acquisition of Discontinuous Easements by Implied Grant."

[3] (1882) I. L. R., 8 Cal., 956.

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The District Judge treating the case as if it fell within section 26 of the Indian Limitation Act, and being of opinion that the defendant had not proved twenty years' peaceable, open, and uninterrupted exercise of the right of way, gave the plaintiff an injunction.

The Calcutta High Court, Field and Bose, JJ., disapproved of this method of dealing with the case, and expressed the opinion that the acquisition of the easement need not be restricted to the operation of the Indian Limitation Act, but might be claimed by virtue of a presumed grant, and they accordingly remanded the case to the District Judge to determine whether, if the right had not been lost, the doctrine of presumed grant was applicable to the particular easement.

They thought that this presumed grant might arise in two ways, either (*a*) as an easement of necessity, or (*b*) if the use of the path though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance; in which case if the easement was apparent and continuous, there would be a presumption that it passed with the defendant's tenement.

From the language used by the learned Judges it was apparently assumed by them that the right of way might pass as a *quasi*-easement by presumption of law upon the principle of the *disposition of the owner of two tenements* (*destination du père de famille*), and they were of opinion that such principle was just and fair and accorded with common-sense, and that it was in consonance with the rule of justice, equity, and good conscience which must guide the Courts in the absence of positive direction by the Legislature.

Now, with great respect to the learned Judges it would seem that, in arriving at this conclusion, they had lost sight of two very important considerations, first, that a right of way being a discontinuous and not a continuous easement cannot, upon well-recognised principles, pass by presumed grant or operation of law as a *quasi*-easement, and, secondly, that, as held by no less an authority than Lord Westbury himself in

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the case of *Suffield* v. *Brown*,[1] the comparison of the disposition of the owner of two tenements to the *destination du père de famille* is a mere fanciful analogy, from which rules of law ought not to be derived.

First, the learned Judges appear to have fallen into a similar error as Lord Romilly, M.R., in *Watts* v. *Kelson*, under converse conditions.

In *Watts* v. *Kelson*,[2] the Master of the Rolls fell into the error of applying to a continuous easement principles governing the acquisition of a discontinuous easement by implied grant. In *Charu Surnokar* v. *Dokouri Chunder Thakoor*, the learned Judges applied to a discontinuous easement the principles governing the acquisition of continuous easements by presumed grant.

Watts v. *Kelson*.

In *Watts* v. *Kelson*, the Court of Appeal, whose judgment was delivered by *Mellish*, L.J., in overruling the Master of the Rolls, observed as follows[3]:—

"The Master of the Rolls has held, on the authority of "*Thomson* v. *Waterlow* and *Langley* v. *Hammond*, that, because "the artificial watercourse was first made and begun by a "person who was owner of both properties, and had no prior "existence at a time when the properties were separately "owned, the general words in this conveyance were not suffi- "cient to pass the rights. *Thomson* v. *Waterlow* and *Langley* "v. *Hammond* were both cases of rights of way, and we cannot "but think that, in the decision of the Master of the Rolls, "the well-established distinction between easements, like rights "of way which are only used from time to time, and what are "called continuous easements has been overlooked. In *Polden* "v. *Bastard*,[4] Chief Justice Erle, delivering the unanimous "judgment of the Exchequer Chamber, says, 'There is a "'distinction between easements such as a right of way, or "'easements used from time to time, and easements of "'necessity, or continuous easements.'"

"'The cases recognise this distinction, and it is clear law

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[1] (1864) 4 De G. J. & S., 185.
[2] (1870) L. R., 6 Ch. App., 166.
[3] *Ibid.* at p. 173.
[4] (1863) L. R., 1 Q. B., 156 (161).

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"'that upon a severance of tenements easements used as of "'necessity or in their nature continuous will pass by implica- "'tion of law, without any words of grant; but with regard "'to easements which are used from time to time only, they "'do not pass, unless the owner by appropriate language "'shews an intention that they should pass.'" "We are "clearly of opinion that the easement in the present case was "in its nature continuous."

Secondly, Lord Westbury's emphatic repudiation in *Suffield* v. *Brown* of the analogy between the disposition of the owner of two tenements and the *destination du père de famille*, which was apparently not present to the minds of the learned judges in *Charu Surnokar* v. *Dokouri Chunder Thakoor*, shews that no assistance can, or ought to be, derived from the latter principle.

Lord Westbury says[1]:—

"Many rules of law are derived from fictions, and the "rules of the French Code, which Mr. Gale has copied,[2] are "derived from the fiction of the owner of the entire heritage, "which is afterwards severed, standing in the relation of *père* "*de famille*, and impressing upon the different portions of his "estate mutual services and obligations which accompany such "portions when divided among them, or even, as it is used in "French law, when aliened to strangers. But this comparison "of the disposition of the owner of two tenements to the "*destination du père de famille* is a mere fanciful analogy, from "which rules of law ought not to be derived."

In further support of their decision the learned Judges in *Pyer* v *Carter*, *Charu Surnokar* v. *Dokouri Chunder Thakoor* referred to the case of *Pyer* v. *Carter*,[3] which since the decision in *Wheeldon* v. *Burrows*,[4] can no longer be relied on,[5] but which at one time was considered as properly deciding that *quasi*-easements arise by presumption of law without express words of reservation as

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[1] (1864) 4 De G. J. & S. at p. 195.
[2] Gale on Easements, 3rd Ed., p. 81.
[3] (1857) 1 H. & N., 916.
[4] (1878) 12 Ch. D., 31.
[5] *See infra* (*b*).

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much in favour of the grantor reserving the *quasi*-dominant tenements as of the grantee obtaining it.

But at the time the judges of the Calcutta High Court relied on *Pyer* v. *Carter*, it had been more than once dissented from and had been finally rejected in *Wheeldon* v. *Burrows*, and even if it had been good law at that time, it is difficult to see how the learned Judges could have derived any assistance from it, as it was not a case of a right of way, but of a right to have water flowing through a drain from one tenement to another, the former tenement having been retained by the grantor at the time of the sale of the latter tenement, and subsequently sold to a third person who claimed the easement.

Such being the existing state of the English law at the time of the decision in *Charu Surnokar* v. *Dokouri Chunder Thakoor*, it is not easy to understand why the Court should have ignored it and adopted principles which a series of recent English decisions had repudiated. If the Court had recognised its own departure from existing principles and justified it on the ground of justice, equity, and good conscience as applying to special conditions in India, it is reasonable to suppose that there would have been some explanation in the judgment to that effect, but the absence of any such explanation tends to confirm the view that the Court was proceeding under a misconception of the English law.

Does not agree with Indian Easements Act and has not been followed by subsequent decisions.

In expressing the view that easements of way (not being ways of necessity) may be acquired as *quasi*-easements by presumption of law, the case of *Charu Surnokar* v. *Dokouri Chunder Thakoor* stands alone.

It neither agrees with the provisions of section 13 read with section 5 of the Indian Easements Act,[1] nor has it been followed in India.

Wutzler v. *Sharpe*.

In the recent case of *Wutzler* v. *Sharpe*,[2] decided by the Allahabad High Court, the plaintiffs, who were the proprietors of the Charleville Hotel, Mussoorie, sued the defendant for the declaration of a right of way over a road running across his

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[1] *See* particularly cls. (*b*), (*d*), and (*f*) of s. 13, and illustrations (*a*) and (*b*) to s. 5, App. VII.

[2] (1893) I. L. R., 15 All., 270.

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property which they claimed to use as a means of access to a spring for the purpose of obtaining water therefrom for the use of the hotel. The properties of the plaintiffs and defendant adjoined one another and had at one time been united in the same owner, who was accustomed to use the particular way claimed for the same purpose of obtaining water from the spring for the use of the hotel. There was another, but smaller and much less convenient path from the hotel to the spring. The plaintiffs became owners of their portion of the property in 1886, and the defendant of his portion in 1888. The plaintiffs continued to use the abovementioned road through the defendant's property for the purpose of getting water for the hotel until 1889, when the defendant refused to permit them any longer to use the road.

The plaintiffs then brought the action, and claimed a right of way as of absolute necessity and, in the alternative, as a *quasi*-easement on the authority of *Charu Surnokar* v. *Dokouri Chunder Thakoor*.

On special appeal, the High Court decided, first, that there was no absolute necessity for the use of the way claimed since, owing to the existence of the smaller and less convenient path, the question became merely one of expense affecting the profitable working of the hotel; and, secondly, after an exhaustive review of the English authorities, that no right of way could pass by presumption of law on a severance of tenements as an apparent and continuous easement. *Charu Surnokar* v. *Dokouri Chunder Thakoor* was considered to be contrary to English authority and to have been wrongly decided.

Krishnamarazu v. *Marraju*.

And in *Krishnamarazu* v. *Marraju*,[1] it was apparently treated as unquestionable that the easement of way there claimed could not pass under section 13 (*f*) of the Indian Easements Act as it was not an apparent and continuous easement.

In conclusion it should be observed that the passing of

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[1] (1905) I. L. R., 28 Mad., 495 (497).

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quasi-easements upon the alienation to different persons of tenements previously in the ownership of the same person is not defeated by the fact that the dominant tenement at the time of severance is in lease, and consequently not in the possession of the alienor.[1]

(*b*) *Law as to the acquisition of quasi-easements when the quasi-servient tenement is conveyed to the grantee and the quasi-dominant tenement is retained by the grantor.*

Subject to certain exceptions, the legal presumption under which *quasi*-easements have been seen to arise in favour of the grantee of the *quasi*-dominant tenement does not operate similarly in favour of the grantor who retains the *quasi*-dominant tenement.

English law.

The general rule in England, now well-established by a series of decisions culminating in the case of *Wheeldon* v. *Burrows*,[2] which has settled the law on the subject, is that *quasi*-easements cannot arise in favour of the grantor unless expressly reserved in his grant, inasmuch as the grantor by a grant for valuable consideration is, in the absence of such express reservation, taken to have relinquished all rights over the tenement granted, and to be thereby afterwards precluded from doing anything which derogates from his grant. This general rule has certain exceptions which will be noticed hereafter, but, for the present, it is thought desirable to consider separately the English cases supporting the general rule and then to see whether the same rule prevails in India under and outside the Indian Easements Act.

Nicholas v. *Chamberlain.*

The earliest case is that of *Nicholas* v. *Chamberlain*,[3] in which it was held that if a man erects a house and builds a conduit therefrom to another part of his land and conveys water by pipes to the house and afterwards sells the house with the appurtenances *excepting* the land, or sells the land to another, *reserving* to himself the house, the conduit and

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[1] *Barnes* v. *Loach* (1879), 4 Q. B. D., 494.

[2] (1879) 12 Ch. D., 31.

[3] (1607) Cro. Jac., 121.

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pipes pass with the house, because it is necessary and quasi-appendant thereto.

Though from the use of the words "necessary and quasi-appendant thereto" this case would appear to conflict with the general rule above stated, it will be found, on closer examination, that the case is capable of explanation on two grounds, either as a case of necessity in which, as has been seen, easements can undoubtedly arise in favour of a grantor by presumed reservation,[1] or as being the case of a grant of the whole of the conduit through which the water ran, as being a corporeal part of the house and passing in that capacity.[2]

Palmer v. *Fletcher*.

The next case is *Palmer* v. *Fletcher*,[3] in which the proposition that if a man wishes to derogate from his own grant or reserve any right to himself he should so state in the grant itself, was mooted, but there was a difference of opinion in the Court and the point was not decided.

Tenant v. *Goldwin*.

Then comes the case of *Tenant* v. *Goldwin*,[4] which throws light on what was intended to be decided in *Nicholas* v. *Chamberlain* and supports the explanation given of the case in *Wheeldon* v. *Burrows*. Further, in *Tenant* v. *Goldwin*, Lord Holt in delivering the judgment of the Court expressly dealt with the very point which had been raised in *Palmer* v. *Fletcher*, and in the following way, "as to the case of *Palmer* v. "*Fletcher*, if, indeed, the builder of the house sells the house "with the lights and appurtenances, he cannot build upon the "remainder of the ground so near as to stop the lights of the "house; and as he cannot do it, so neither can his vendee. "But if he had sold the vacant piece of ground, and kept the "house *without reserving* the benefit of the lights, the vendee "might build against his house. But in the other case where "he sells the house, the vacant piece of ground is by that "grant charged with the lights."

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[1] *See per* Thesiger, L.J., in *Wheeldon* v. *Burrows* (1879), L. R., 12 Ch. D. at p. 50, and *supra*, Part IV, A.

[2] *See per* James, L.J., in *Wheeldon* v. *Burrows*, *ubi sup.* at p. 60.

[3] (1615) 1 Lev., 122.

[4] (1705) 2 Ld. Raym., 1093.

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This clear enunciation of the law has been repeatedly affirmed in later decisions, and the only case which breaks the otherwise unbroken current of authority is that of *Pyer* v. *Carter*.

Pyer v. Carter.

In *Pyer* v. *Carter*,[1] the owner of two houses granted one of them to a purchaser absolutely, and without reservation, and he subsequently granted the other house to another purchaser. Prior to, and at, the time of grant the second house was drained by a drain that ran under the foundations of the first house, and this being obstructed by the defendant, who was the first purchaser, the plaintiff, who was the second purchaser, brought an action against him for the obstruction.

It was held that the plaintiff was entitled to maintain the action, and that upon the original conveyance to the defendant there was a reservation to the grantor of the right to drain water from the defendant's premises on to the plaintiff's land, as had formerly been done during unity of ownership.

In this case the Court of Exchequer went beyond the recognised doctrine and laid down that there was no distinction between implied reservation and implied grants.

White v. Bass.

Though the actual decision in *Pyer* v. *Carter* may not be said to have been exactly overruled, the principles there laid down were clearly and distinctly rejected, by the same Court in *White* v. *Bass*.[2]

In that case there were held in unity of ownership certain land, and a certain house through the windows of which, light, not as an easement, but as a matter of enjoyment, had come for some time. The owner, reserving the house, let the land to trustees, subject to certain covenants whereby they were to build in a particular manner upon the land, and if such covenants had been complied with, there would have been no obstruction of the lights of the house reserved. This was followed by a conveyance of the reversion in the land to the trustees, and in that conveyance there was no covenant not to obstruct the lights nor any limitation of the right to use the

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[1] (1857) 1 H. & N., 916.

[2] (1862) 7 H. & N., 722.

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land. Subsequently to that conveyance the house was conveyed to a purchaser, and buildings having been erected upon the land conveyed to the trustees, contrary to the terms of this original covenant, and of such a kind as obstructed the lights of the house, an action was brought by the purchaser for the obstruction.

It was decided that the lease having merged in the fee by the conveyance of the reversion to the lessees, and there being no covenant in such conveyance not to obstruct the plaintiff's lights, the defendant held his land unfettered by the original covenant and by any implied reservation, and that he was entitled to build on his land in such a way as he thought proper, even though by doing so he were to obstruct the plaintiff's lights.

This case was followed in point of time by *Suffield* v. *Brown*.[1] There the plaintiffs were respectively the owners in fee and lessee of a dock situate on the Thames at Bermondsey, and used for repairing ships, principally sailing vessels. *Suffield* v. *Brown*.

The defendant was the owner in fee of a strip of land and coal wharf adjoining the dock, on which he had begun to build a warehouse.

The plaintiffs filed the bill in this suit for an injunction to restrain such building on the ground that when their dock was occupied by a vessel of large size her bowsprit must project over the boundary fence of the dock, across the defendant's premises, which it could not do if the defendant's building should be erected, and that they had a right to restrain such building, because it would deprive them of an easement or privilege which they were entitled to use or exercise over the land of the defendant.

The dock and the adjoining strip of land and coal wharf had formerly belonged to the same owner, until he sold and conveyed, first, the strip of land and coal wharf to the defendant's predecessor and, subsequently, the dock to the plaintiff's predecessor.

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[1] (1864) 4 De G. J. & S., 185.

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At the time of severance nothing was stated to shew that the dock or its owner either then had, or were intended to have, any right or privilege over the adjoining premises.

The Master of the Rolls, Lord Romilly, following the decision in *Pyer* v. *Carter*, granted the plaintiffs an injunction on the ground that the projection of the bowsprit from the vessel in the dock across the defendant's premises was essential to the full and complete enjoyment of the dock as it stood at the time that the wharf was sold to the purchaser under whom the defendant claimed, and that the purchaser and the defendant had distinct notice of this fact, not merely from the description contained in the particulars of sale under which he bought, but also because the fact was patent and obvious to any one, for the reason that if the dock admitted the largest vessel capable of being contained in it, the bowsprit must project over that portion of the defendant's premises indicated.

On appeal the decree of the Master of Rolls was reversed, and the injunction granted by him dissolved, by the Lord Chancellor, Lord Westbury, in a judgment which is important for the principles it clearly expounds and establishes and for its emphatic dissent from the doctrine of *Pyer* v. *Carter*.

The Lord Chancellor, after observing that it was difficult to understand how any interest, right, or claim, in, over, or upon, the coal wharf could remain in the grantor, or be granted by him to a third person, consistently with the prior absolute and unqualified grant that was made of the coal wharf premises to the purchaser, or how, even if the vendor during his joint occupation of both properties had been in the habit of making the coal wharf subservient in any way to the purposes of the dock, the necessary operation of the absolute and unqualified grant would be other than to cut off and release the right to make such use of the coal wharf, proceeds as follows[1]:—

"It seems to me more reasonable and just to hold that if "the grantor intends to reserve any right over the property "granted, it is his duty to reserve it expressly in the grant,

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[1] At p. 190.

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"rather than to limit and cut down the operation of a plain "grant (which is not pretended to be otherwise than in con- "formity with the contract between the parties) by the fiction "of an implied reservation. If this plain rule be adhered to, "men will know what they have to trust, and will place con- "fidence in the language of their contracts and assurances. "But this view of the case is not taken by his Honour the "Master of the Rolls." Lord Westbury then refers to the ground, already mentioned, upon which the Master of the Rolls states that he grants the injunction, and proceeds to deal specifically with the ground of notice on which the Master of the Rolls relies. He says: "The effect of this is, that if I "purchase from the owner of two adjoining freehold tene- "ments the fee-simple of one of those tenements and have it "conveyed to me in the most ample and unqualified form, I "am bound to take notice of the manner in which the adjoin- "ing tenement is used or enjoyed by my vendor, and to "permit all such constant or occasional invasions of the pro- "perty conveyed as may be requisite for the enjoyment of the "remaining tenement in as full and ample a manner as it "was used and enjoyed by the vendor at the time of such sale "and conveyance. This is a very serious and daring doctrine; "I believe it to be of very recent introduction; and it is in "my judgment unsupported by any reason or principle, when "applied to grants for valuable consideration."

"That the purchaser had notice of the manner in which "the tenement sold to him was used by his vendor for the "convenience of the adjoining tenement is wholly immaterial, "if he buys the fee-simple of his tenement, and has it "conveyed to him without any reservation. To limit the "vendor's contract and deed of conveyance by the vendor's "previous mode of using the property sold and conveyed is "inconsistent with the first principles of law, as to the effect "of sales and conveyances. Suppose the owner of a manu- "factory to be also the owner of a strip of land adjoining it on "which he has been for years in the habit of throwing out the "cinders, dust, and refuse of his workshops, which would be

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"an easement necessary (in the sense in which that word is "used by the Master of the Rolls) for the full enjoyment of "the manufactory; and suppose that I, being desirous of "extending my gardens, purchase this piece of land and have "it conveyed to me in fee-simple; and the owner of the "manufactory afterwards sells the manufactory to another "person; am I to hold my piece of land subject to the right "of the grantee of the manufactory to throw out rubbish on "it? According to the doctrine of the judgment before me "I certainly am so subject; for the case falls strictly within "the rules laid down by his Honour and reduces them to an "absurd conclusion."

The Lord Chancellor then explains the apparent origin of the erroneous doctrine, and says that he cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor. He refers to the comparison of the disposition of the owner of the two tenements to the *destination du père de famille* upon which the rule in *Pyer* v. *Carter* was apparently based in the following language[1]: "But this comparison of "the disposition of the owner of the two tenements to the "*destination du père de famille* is a mere fanciful analogy, from "which rules of law ought not to be derived. And the analogy, "if it be worth grave attention, fails in the case to be decided, "for when the owner of two tenements sells and conveys one "for an absolute estate therein, he puts an end, by contract, "to the relation which he had himself created between the "tenement sold and the adjoining tenement; and discharges "the tenement so sold from any burthen imposed upon it "during his joint occupation; and the condition of such tene-"ment is thenceforth determined by the contract of alienation "and not by the previous user of the vendor during such joint "ownership."

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[1] At p. 195.

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Lord Westbury then proceeds to discuss *Pyer* v. *Carter* in the following manner[1]:—

Pyer v. *Carter* discussed in *Suffield* v. *Brown* and rejected.

"And this observation leads me to notice the fallacy in the "judgment of the Court of Exchequer in the case of *Pyer* v. "*Carter*, one of the two cases on which the Master of the Rolls "relies. In *Pyer* v. *Carter* the owner of two houses sold and "conveyed one of them to a purchaser absolutely, and without reservation, and he subsequently sold and conveyed "the remaining house to another person. It appeared that the "second house was drained by a drain that ran under the "foundation of the house first sold; and it was held that "the second purchaser was entitled to the ownership of the "drain, that is, to a right over a freehold of the first purchaser, "because, said the learned judges, the first purchaser takes "the house 'such as it is.' But, with great respect, the "expression is erroneous, and shews the mistaken view of the "matter, for in a question, as this was, between the purchaser "and the subsequent grantee of his vendor, the purchaser "takes the house not 'such as it is,' but such as it is described "and sold and conveyed to him in and by his deed of con-"veyance; and the terms of the conveyance in *Pyer* v. *Carter* "were quite inconsistent with the notion of any right or "interest remaining in the vendor. It was said by the Court "that the easement was 'apparent,' because the purchaser "might have found it out by inquiry; but the previous ques-"tion is whether he was under any obligation to make inquiry, "or would be affected by the result of it; which, having regard "to his contract and conveyance, he certainly was not. Under "the circumstances of the case in *Pyer* v. *Carter* the true "conclusion was, that as between the purchaser and the vendor "the former had a right to stop and block up the drain where "it entered his premises, and that he had the same right "against the vendor's grantee. I cannot look upon the case "as rightly decided, and must wholly refuse to accept it as "any authority."

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[1] *Ibid.*

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After reviewing the other cases, the Lord Chancellor concludes his judgment as follows[1]:—

"There is in my judgment no possible legal ground for "holding that the owner of the dock retained or had in respect "of that tenement any right or easement over the adjoining "tenement after the sale and alienation of the latter in the "year 1845. I must entirely dissent from the doctrine on "which his Honour's decree is founded, that the purchaser "and grantee of the coal wharf must have known, at the "time of his purchase, that the use of the dock would require "that the bowsprits of large vessels received in it should "project over the land he bought, and that he must be "considered, therefore, to have bought with notice of this "necessary use of the dock, and that the absolute sale and "conveyance to him must be cut down and reduced accord-"ingly. I feel bound, with great respect, to say that in my "judgment such is not the law."

"But if any part of this theory were consistent with law, "it would not support the decree appealed from, for the "easement claimed by the plaintiff is not 'continuous,' for "that means something the use of which is constant and "uninterrupted; neither is it 'an apparent easement,' for "except when a ship is actually in the dock with her bowsprit "projecting beyond its limits, there is no sign of its existence; "neither is it a 'necessary easement,' for that means some-"thing without which (in the language of the treatise cited) "the enjoyment of the dock could not be had at all."

"But this is irrelevant to my decision, which is founded "on the plain and simple rule that the grantor, or any person "claiming under him, shall not derogate from the absolute "sale and grant he has made."

Effect of *Suffield* v. *Brown*.

The gist of this important case may, therefore, be said to be that if, on a severance of tenements, the grantor desires to reserve any right or easement to himself over the tenement granted, he must do so in express terms, and that in the

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[1] P. 199.

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absence of such express reservation the grantee will take the *quasi*-servient tenement free from all rights, privileges or easements notwithstanding any knowledge on his part, actual or constructive, of the use which was made of the tenement granted to him at the time of the severance.[1]

The same principle was recognised by the Vice-Chancellor Kindersley in *Curriers Company* v. *Corbett*,[2] though he expressed the opinion that the law in this respect, "if carried "to an extreme, would in some cases produce great and "startling injustice." *Curriers Co.* v. *Corbett.*

Lord Westbury's view in *Suffield* v. *Brown* obtained the concurrence of Lord Chelmsford, L.C., in *Crossley & Sons* v. *Lightowler*.[3] The latter, in dealing with a similar question, expressed himself as follows :— *Crossley & Sons* v. *Lightowler.*

"Lord Westbury, however, in the case of *Suffield* v. *Brown* "refused to accept the case of *Pyer* v. *Carter* as an authority, "and said: 'It seems to be more reasonable and just to hold "'that if the grantor intends to reserve any right in the "'property granted it is his duty to reserve it expressly in "'the grant rather than to limit and cut down the operation "'of a plain grant (which is not pretended to be otherwise "'than in conformity with the contract between the parties) "'by the fiction of an implied reservation.' I entirely agree "with this view. It appears to me to be an immaterial "circumstance that the easement should be apparent and "continuous, for *non constat* that the grantor does not intend "to relinquish it unless he shews the contrary by expressly "reserving it. The argument of the defendants would make,

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[1] In *Amutgol Russool* v. *Jhoomuck Singh* (1875), 24 W. R. (C. R.), p. 346, the statement that the correctness of the principle laid down in *Suffield* v. *Brown* was questioned in the subsequent case of *Watts* v. *Kelson* (1870), L. R., 6 Ch. App., 166, appears to have proceeded upon a misapprehension of what was decided in those two cases. For, as explained in the later case of *Wheeldon* v. *Burrows* (1879), 12 Ch. D., 31, *Suffield* v. *Brown* repudiates the doctrine of an implied reservation arising in favour of a grantor retaining the *quasi*-dominant tenement, whilst *Watts* v. *Kelson* merely decides the converse that a *quasi*-easement will pass by presumed grant to a grantee of the *quasi*-dominant tenement. *See* further *infra*.

[2] (1865) 2 Dr. & Sm., 355.

[3] (1867) L. R., 2 Ch. App., 478.

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"in every case of this kind, an implied reservation by law; "and yet the law will not reserve anything out of a grant "in favour of a grantor except in case of necessity."

Watts v. *Kelson*.

Watts v. *Kelson*,[1] before the Court of Appeal, comes next in chronological order and requires notice here for the reason that, in the later case of *Wheeldon* v. *Burrows*,[2] the appellant endeavoured to use it as an authority for setting up *Pyer* v. *Carter*, and shaking *Suffield* v. *Brown*. But the Court of Appeal in *Wheeldon* v. *Burrows* refused to recognise *Watts* v. *Kelson* as an authority which would justify the overruling of *Suffield* v. *Brown*, supported as it was by the case of *Crossley & Sons* v. *Lightowler*. The Lord Justices explained that the point for decision in *Watts* v. *Kelson* was that a *quasi*-easement will pass by presumed grant where the dominant tenement is conveyed first, and that there was nothing in the considered judgment of the Court in that case to the effect that *Suffield* v. *Brown* was not law.

Wheeldon v. *Burrows*.

The next case is that of *Wheeldon* v. *Burrows*,[3] which has decisively settled the law on this subject.

The material facts of this case are short and simple and may be taken from the judgment of the Appeal Court as delivered by Thesiger, L.J.

Prior to the month of November, 1875, a person named *Samuel Tetley* was the owner of certain property in *Derby*, which included a piece of vacant land having a frontage to the street, and a silk manufactory and certain workshops at the rear of and abutting upon that vacant land. In one of the workshops were certain windows which opened upon that land. Owning this property *Tetley* resolved to sell it, and appears to have put it up in several lots for sale by auction; and in respect of some of the lots, including a lot which was afterwards sold to the defendant, the sale by auction was abortive.

However, an agreement was made at the auction to sell one

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[1] (1870) L. R., 6 Ch. App., 166.
(1879) 12 Ch. D., 31.

[2] *Ibid.*

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of the lots to the plaintiff's husband, and the lot was conveyed to him upon the 6th day of January, 1876, with these general words, "together with all walls, fences, sewers, gutters, drains, "ways, passages, lights, watercourses," and the other general words, "easements and appurtenances whatsoever to the said "piece of land and hereditaments belonging or in any wise "appertaining."

The conveyance contained no reservation in express terms of any right to the grantor in respect of his other land. On the 18th of February a contract was made whereby *Tetley* contracted to sell to the defendant the silk manufactory and the workshop which had the windows opening upon the land previously sold and conveyed to the plaintiff's husband.

The action arose from a claim on the part of the defendant to have as of right the light to enter into those windows, or, in other words, to prevent the plaintiff from obstructing those windows by building on her land.

At the trial before Vice-Chancellor Bacon, that Judge decided that no right in respect of the windows being reserved either impliedly or expressly under the conveyance of January, 1876, and the defendant being privy in estate with the grantor of the land which was the subject of the conveyance, no right to light through the windows arose in favour of the defendant, and that the plaintiff was accordingly entitled to build upon her land, though the result of such building might be to obstruct the lights.

On appeal, the judgment of the Vice-Chancellor was affirmed.

In the judgment of Thesiger, L.J., the following passage occurs [1]:—

"We have had a considerable number of cases cited to us, "and out of them I think that two propositions may be stated "as what I may call the general rules governing cases of this "kind."

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[1] *Ubi sup.* at p. 49.

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The first of these general rules has already been set out in connection with the acquisition of *quasi*-easements by the grantee of the *quasi*-dominant tenement.[1]

The second of these rules is stated by Lord Justice Thesiger as follows[2]! "The second proposition is that if a "grantor intends to reserve any right over the tenement "granted, it is his duty to reserve it expressly in his "grant."

"Those are the general rules covering cases of this kind, "but the second of those rules is subject to certain excep- "tions."[3]

"One of those exceptions is the well-known exception "which attaches to cases of what are called ways of necessity; "and I do not dispute for a moment that there may be, and "probably are, certain other exceptions, to which I shall "refer before I close my observations upon this case."

"Both of the general rules which I have mentioned are "founded upon a maxim which is as well-established by "authority as it is consonant to reason and common-sense, "*viz.* that a grantor cannot derogate from his own grant. It "has been argued before us that there is no distinction "between what has been called an implied grant and what is "attempted to be established under the name of an implied "reservation; and that such a distinction between the implied "grant and the implied reservation is a mere modern inven- "tion, and one which runs contrary, not only to the general "practice upon which land has been bought and sold for a "considerable time, but also to authorities which are said to "be clear and distinct upon the matter."

"So far, however, from that distinction being one which "was laid down for the first time by and which is attributed "to Lord Westbury in *Suffield* v. *Brown*, it appears to me "that it has existed almost as far back as we can trace the "law upon the subject; and I think it right, as the case is

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[1] *Supra*, Part IV, B, I (*a*) (1).

[2] *Ubi sup.* at p. 49.

[3] For these exceptions, *see supra*, Part IV, A, and *infra*.

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"one of considerable importance, not merely as regards the "parties, but as regards vendors and purchasers of land "generally, that I should go with some little particularity "into what I may term the leading cases upon the subject."

The Lord Justice then goes into the cases and notices the exceptions to the second general rule.[1]

In *Allen* v. *Taylor*,[2] Jessel, M.R., said: "I take it also that "it is equally settled law that if a man who has a house "and land grants the land first reserving the house, the "purchaser of the land can block up the windows of the "house." *Allen* v. *Taylor*.

In *Russell* v. *Watts*,[3] Lord Selborne refers to the general rule, as exemplified in *Wheeldon* v. *Burrows*, "that if a man "entitled to a house with windows, however long enjoyed, "sells and grants away the adjoining land without any con- "dition, reservation, or other form of contract which can "operate restrictively against the grantee, he is not at liberty "to derogate from his own grant, so as to prevent any use, "otherwise lawful, of the land granted, although the windows "of his house may be darkened thereby." *Russell* v. *Watts*.

The circumstances of this last case were peculiar. One *Jeffery*, upon land consisting of seven plots marked respectively A, B, C, D, E, F, and G, and forming together one square block, and held by him under seven simultaneous leases from the same owner, commenced the erection of a large building for the purposes of his drapery business, of which building the several parts and the internal arrangements were to be connected together for a common use and occupation, but capable, if so desired, of separation into separate buildings or blocks.

While the building was in course of erection *Jeffery*, being in occupation of the whole, mortgaged by demise the blocks comprised in the leases C, F, and G, the mortgagee having notice of the general scheme of construction, and there being

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[1] *See* Part IV, A, *supra*, and *infra*.
[2] (1880) 16 Ch. D. at p. 358.
[3] (1885) 10 App. Cas. at p. 596.

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a stipulation that *Jeffery* should complete the part comprised in his mortgage in accordance with the plans. Subsequently *Jeffery* executed a similar mortgage of E and afterwards mortgaged B.

On the bankruptcy of *Jeffery* the several mortgagees obtained foreclosure decrees in respect of B, C, and E respectively.

The defendants claiming to be entitled to plots C and E blocked up windows in that part of the building of which the plaintiff was in possession and which he was using as a hotel, namely, block B, and the action was brought by the latter to restrain the obstruction and to determine the rights of the plaintiff as the owner and occupier of block B to the free access of light to those of his windows which faced the other portions of the building in the possession and occupation of the defendants.

The plaintiff claimed an easement of light as a *quasi*-easement, that is, on the ground that it was apparent, continuous, and necessary for the convenient enjoyment of the plaintiff's hotel and the property of the Corporation of *Liverpool* who were the common landlords of the plaintiff and the defendants.

The defendants denied the right to the easement on the authority of *Wheeldon* v. *Burrows*, inasmuch as the instruments under which the plaintiff claimed did not contain any express reservation of the light.

Bacon, V.C., granted an injunction restraining the defendants from trespassing on the plaintiff's premises, or from erecting any structure or doing any act so as to obstruct the access of light to any of the plaintiff's windows as, in his view, *Wheeldon* v. *Burrows* have nothing to do with the present case, and the defendants were estopped by their own conduct from obstructing the plaintiff's windows, for the reason that they had approved and accepted a general scheme of building of which they were owners of a part, and the plaintiff likewise, and that having full knowledge of the windows the plaintiff intended to open, and not objecting, they could not now erect

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any structure or do any act so as to obstruct the access of light to the plaintiff's windows.[1]

On appeal, the majority of the Court, Lindley, L.J., dissenting, reversed the decision of Bacon, V.C., considering the matter concluded by the authority of *Wheeldon* v. *Burrows*.[2]

Lindley, L.J., apparently in accord with the view of the Vice-Chancellor, put the plaintiff's right to the easement on the ground of estoppel.[3]

The House of Lords agreeing by a majority[4] with Bacon, V.C., and Lindley, L.J., reversed the order of the Appeal Court and restored that of the Vice-Chancellor.[5]

They thought that this was not the case, falling within *Wheeldon* v. *Burrows*, of a vendor of a piece of land attempting to derogate from his own grant, but one of a mutual agreement, the effect of which was a reciprocal contract of each of the parties to it with the other, and that for either party to insist on the benefit of such an agreement, so far as it was in his favour, was not to derogate from his own grant, but to require that the other party should not do so.

Independently of the principles established in cases of simultaneous conveyances to which particular reference will be made hereafter, Lord Selborne expressed the opinion that if on a sale and conveyance of land adjoining a house to be built by the vendor, it is mutually agreed that one of the outer walls may stand wholly or partly within the verge of the land sold, and shall have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, the purchaser cannot afterwards build upon the land sold so as to prevent or obstruct the access of light to those windows.

The circumstances in *Russell* v. *Watts* and the principles upon which it was decided clearly differentiate it from

Russell v. *Watts*, clearly distinguishable from *Wheeldon* v. *Burrows*.

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[1] (1882) 25 Ch. D., 559.
[2] *Ibid.* at pp. 572 *et seq.*
[3] *Ibid.* at p. 577.
[4] Lord Selborne and Lord Fitzgerald; Lord Blackburn dissented.
[5] (1885) 10 App. Cas., 590.

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Wheeldon v. *Burrows*, which remains unshaken upon the particular subject with which it deals.

Union Lighterage Co. v. *London Graving Dock Co.*

In *Union Lighterage Company* v. *London Graving Dock Company*,[1] the owner in fee simple, in 1860, of two adjoining pieces of land had leased out the western part as a wharf and shipbuilding yard, and was in occupation of the eastern part himself. In the same year he constructed a graving dock in his own premises with wooden sides which, by arrangement with his tenants, he caused to be supported by rods or ties carried through the boundary fence under the wharf to a particular distance and fastened by nuts to piles placed at that particular point.

In 1877 the owner died and thereafter, both the properties being in hand, the persons entitled under his will conveyed the wharf premises to the plaintiffs, without expressly reserving to themselves any right of support.

In 1886 the deceased owner's devisees sold the dock revenues to a company which subsequently conveyed them to the defendants. No mention of support was made in the conveyance.

The action was brought by the plaintiffs to have it declared that they were entitled to remove the means of support to the graving dock without interference from the defendants.

Upon the question whether on the conveyance of 1877 to the plaintiffs there was an implied reservation in favour of the vendors of a right to the then existing support to the dock, Cozens-Hardy, J., observed as follows[2]:—

"On the first point I am clearly of opinion that there "was no implied reservation in favour of the vendors when the "wharf was conveyed to the plaintiffs in 1877. The judgment "of Lord Westbury in *Suffield* v. *Brown*, followed by the "judgment of Lord Chelmsford in *Cressley & Sons* v. *Lightowler*, "has been distinctly adopted by the Court of Appeal in the "leading case of *Wheeldon* v. *Burrows*. It seems to me that,

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[1] (1901) 2 Ch., 300; S.C. on appeal, (1902) 2 Ch., 557.

[2] (1901) 2 Ch. at p. 304.

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"in a case like this, the vendors must expressly reserve any "such right, and that the purchaser is, in the absence of "express reservation, entitled to rely upon the plain effect of "the conveyance executed by the vendors."

This decision was affirmed on appeal, it being held by Romer and Stirling, L.JJ., Vaughan Williams, L.J., dissenting, that when the wharf was conveyed to the plaintiffs, there was no implied reservation of the right of support to the dock, and that the tie-rods did not remain vested in the grantors as part of, or appurtenant to, the dock.

Again, in *Ray* v. *Hazeldine*,[1] the general rule was applied, and it was treated as settled law that if a vendor of land wishes to reserve any right in the nature of an easement for the benefit of his adjacent land which he is retaining, he must do so by express words in the deed of conveyance.

Such being the English law, it remains to be considered whether the same law prevails in India, either under the Indian Easements Act, or in those parts of India where the Act is not in force. Law in India as to the general rule.

As to the case-law on this subject the question of the doctrine of implied reservation appears to have been first raised in India in the case of *Charu Surnokar* v. *Dokouri Chunder Thakoor*.[2] *Charu Surnokar* v. *Dokouri Chunder Thakoor*, departure from the English law.

The facts of this case, so far as they are material to the present question, were the following: The owner of a single property made a path over a portion of it, which he continued to use until he granted such portion to the plaintiff. He subsequently granted the remaining portion of his property to the defendant's predecessor in title. The suit was brought by the plaintiff to restrain the defendant from using the path, and the defence raised the alternative plea of title to an easement of way by prescription, or implied reservation on the severance of the tenements.

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[1] (1904) 2 Ch. 17.

[2] (1882) I. L. R., 8 Cal., 956. This case has already been discussed in connection with the inapplicability of the general rule to easements of way, *see supra*, Part IV, B (2) (*e*).

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The District Judge dealt with the case solely under the Indian Limitation Act, and finding the defendant had not acquired any right under that Act, gave the plaintiff an injunction.

On appeal to the High Court, Field, J., in delivering the judgment of the Court, expressed himself as follows [1]:—

"The use of the path and ghat, though not absolutely "necessary to the enjoyment of the defendant's tenement, "might be necessary for its enjoyment in the state in which "it was at the time of the severance; and in this case, if "the easements were apparent and continuous, there would "be a presumption that it passed with the defendant's "tenement."

"This latter case is discussed in the books under the "principle of the *disposition of the owner of two tenements* "(*Destination du père de famille*). See Gale on Easements, "5th Edition, pp. 96, 97, and following pages; and as to right "of way, p. 103 note, p. 124 note, and *Pyer* v. *Carter*.[2] This "principle is just and fair and accords with common-sense."

"It is in consonance with the rule of justice, equity, and "good conscience, which must guide the Courts in the absence "of positive direction by the Legislature."

Now, with all due respect, if this judgment is intended, as so appears, to lay down that an easement apparent and continuous is capable of acquisition on a severance of tenements by the grantor under an implied reservation, and is based, as it admittedly is, on *Pyer* v. *Carter* and the doctrine of *Destination du père de famille*, it comes into direct conflict with the decisions in *Suffield* v. *Brown*[3] and *Wheeldon* v. *Burrows*,[4] where not only was the doctrine just mentioned repudiated in distinct terms, but the rule of implied reservation in *Pyer* v. *Carter* was pronounced to be unsupported by previous decisions and a break in the chain of authority.

There is nothing in the report of the case to shew that

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[1] *Ubi sup.* at pp. 958, 959.
[2] (1857) 1 H. & N., 916.
[3] (1864) 4 De G. J. & S., 185.
[4] (1879) 12 Ch. D., 31.

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Suffield v. *Brown* and *Wheeldon* v. *Burrows* were brought to the notice of the Court, and it may be that the learned Judges not having those decisions before them considered that the correct view of the law was that of Mr. W. Stokes, who, in referring to a similar deviation in the Indian Easements Act, expressed the opinion that the contrary rule in England rested on a doubtful dictum of Lord Holt's.[1] It is difficult on any other supposition to imagine that, without some reason shewn, they would knowingly have departed from the accepted law of England and rejected the emphatic confirmation by the Lord Justices in *Wheeldon* v. *Burrows* of the principle laid down by Lord Holt in *Tenant* v. *Goldwin*.[2]

I. E. Act, s. 13, cl. (*d*). Similar departure from English law.

A similar departure from the English law is to be found in clause (*d*) of section 13 of the Indian Easements Act. That clause runs as follows :—

"If such an easement is apparent and continuous and "necessary for enjoying the said property as it was enjoyed "when the transfer of bequest took effect, the transferor or "the legal representative of the testator shall, unless a different "intention is expressed or necessarily implied, be entitled to "such an easement."

No reason is assigned in Council for the introduction of this clause beyond the short statement in the Objects and Reasons of the Bill[3] that the Bill follows the decision in *Pyer* v. *Carter*, rather than that in *Suffield* v. *Brown*, but why the former case is to be preferred to the latter, supported as it is by the decision in *Wheeldon* v. *Burrows*, and whether such a state of law was better adapted to Indian requirements than the English rule, nowhere appears.

The anomaly is not lessened by Mr. Whitley Stokes' statement that the law of England "being just, equitable, and "almost free from local peculiarities, has in many cases been "held to regulate the subject in this country."[4] It is true

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[1] *See* The Anglo-Indian Codes, Vol. I, p. 882.

[2] (1758) 2 Lord Raym., 1093.

[3] *See Gazette of India*, 1880, Part V, July to December, at p. 477.

[4] *See Gazette of India*, 1880, Part V, July to December, p. 476 ; Anglo-Indian Codes, Vol. I, p. 878.

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that, when Mr. Stokes drafted and introduced the Indian Easements Bill in 1878, the judgment in *Wheeldon* v. *Burrows* had not been delivered, but it was delivered more than two years before the passing of the Act, and the clause might easily have been amended so as to fit that authoritative expression of opinion.

Chunilal Mancharam v. *Manishankar Atmaram.*

The same clause was criticised in the recent decision of the Bombay High Court in *Chunilal Mancharam* v. *Manishankar Atmaram*,[1] a case which was not governed by the Indian Easements Act.

Charu Surnokar v. *Dokouri Chunder Thakoor* not followed.

Upon the facts found in that case, the Court preferred to follow the well-established principles of English law, rather than to apply the doctrine laid down in *Charu Surnokar* v. *Dokouri Chunder Thakoor* and clause (*d*), section 13 of the Indian Easements Act.

On the subject of this clause, Mr. Justice Candy's observations are—

"It is no doubt anomalous that the Easements Act should
"have introduced such a marked variance from the English
"law. This is apparently due to the fact that Mr. W. Stokes,
"who drafted and introduced the Easements Bill in 1878,
"was of opinion that the English law 'rests on a doubtful
"'doctrine of Lord Holt's (see 2 Drew. and Smale, 360).'
"The judgment of the Court of Appeal in *Wheeldon* v. *Burrows*
"had not then been delivered, shewing that the doctrine of
"Lord Holt was not doubtful, but had been laid down in clear
"and distinct terms, and was as well established by authority
"as it is consonant to reason and common-sense. The refer-
"ence to 2 Drew. and Smale, 360, is to the case above quoted of
"*Curriers Co.* v. *Corbett*, in which Vice-Chancellor Kindersley,
"though stating the law, if carried to an extreme, would in
"some cases produce great and startling injustice, yet held
"the law to be in no way doubtful, but quite clear. Since the
"decision of *Wheeldon* v. *Burrows*, there is no room for doubt.
"In *Allen* v. *Taylor*, Jessel, M.R., said that it is 'settled

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[1] (1893) I. L. R., 18 Bom., 616.

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"'law that if a man who has a house and land, grants the land "'first, reserving the house, the purchaser of the land can "'block up the windows of the house.'"

"It is not difficult to see how the Easements Act, "section 13, clause (*d*), has become law. It is apparently "based on the judgments of Mr. Justice Field in *Charu* "*Surnokar* v. *Dokouri Chunder Thakoor*. Mr. Whitley "Stokes acknowledged the assistance given to him by that "learned Judge in drafting the Bill which became the "Easements Act."[1]

In the Bombay case just cited, the plaintiff became the owner by purchase of a certain house, behind which was a courtyard or *chok*, half of which belonged to the defendant's father and half to the plaintiff's vendor. Two of the rear rooms in the plaintiff's house abutted on the latter portion of the *chok*, and had two doors opening out into it. The plaintiff's vendor sold his half of the said *chok* to the defendant's father under a conveyance, which not only contained no reservation of any rights, but expressly recited that the vendor reserved no rights over the *chok*, and thereafter the plaintiff purchased the house. Shortly afterwards the defendant put up a boundary on the *chok*, which blocked up the above-mentioned doors of the plaintiff's house, and obstructed the light and air passing through them into the said two rear rooms. The plaintiff sued for an injunction. The Court in applying to these facts the English principles established by *Suffield* v. *Brown*, *Wheeldon* v. *Burrows* and the other authorities, held that it would be contrary to equity and good conscience to decide that he had impliedly reserved a right of light and air over the *chok*, which would prevent the purchaser from building on the *chok* so purchased so as to obstruct the windows or doors in the vendor's house overlooking the *chok*.

Mr. Justice Candy, by the light of the English authorities,

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[1] *See* abstract of proceedings of the Council of the Governor-General in India, Vols. XX–XXI, 1881–2, Part II, pp. 102, 103.

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evidently considered that *Charu Surnokar* v. *Dokouri Chunder Thakoor* was wrongly decided, and preferred to apply English principles. Mr. Justice Fulton, in contrasting the English and Indian law and admitting the Easements Act could not effect transfers which took place before its introduction, said—

"In England the law has been established by a series of "decisions, subject to which sales take place, but this is not "the case in India. Two Indian decisions, those of *Charu* "*Surnokar* v. *Dokouri Chunder Thakoor*[1] and *Chunilal* v. "*Husein*,[2] appear to go further than the English cases in this "matter. The former of these has, it is true, been recently "criticised by the Allahabad High Court in *Wutzler* v. *Sharpe*,[3] "but whether it was rightly or wrongly decided it seems to be "conceivable that even in regard to light and air a case might "arise where to hold that the vendee of adjacent land was "entitled to render useless the vendor's house by building up "against his windows might be so obviously contrary to what "was contemplated at the time of the sale and be productive, "in the language of Kindersley, V.C. (2 Drew. and Smale, at "p. 360), of such 'great and startling injustice' that a Court "not bound by any positive rule of law on the subject might, "in the exercise of equity and good conscience, think it "necessary to hold that an easement had been meant to be "reserved."

"But while unwilling to decide that, prior to the intro- "duction of the Easements Act, there were any positive rules "in force on this subject, I think that a vendor or his successor "in title claiming such a reservation as is claimed in the "present case, must shew either by reference to the urgent "necessity of the easement or the conduct of the parties to the "sale that it cannot reasonably have been intended by either "of them to do otherwise than reserve to the vendor the right "which he claims."

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[1] (1882) I. L. R., 8 Cal., 956.
[2] (1886) P. J., 128.
[3] (1892) I. L. R., 15 All., 270.

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The case contemplated by the learned Judge of an implied reservation arising out of the conduct or intentions of the parties at the time of sale, does not encroach upon the doctrine of *Suffield* v. *Brown* and *Wheeldon* v. *Burrows*, but falls more properly within the scope of the decision in *Russell* v. *Watts*.[1]

Conflict of law in India.

It is a matter for regret that this conflict of judicial opinion and legislative enactment on the question of a presumed reservation has left the law in India in a state of confusion and uncertainty, and it may be seriously questioned whether *Charu Surnokar* v. *Dokouri Chunder Thakoor* will, in future, be followed in Bengal and the other parts of India in which the Indian Easements Act is not in force.

II.—Exceptions to General Rule against Presumed Reservation.

The cases which furnish exceptions to the second general rule above stated, and in which a reservation of apparent and continuous easements can arise by presumption of law on a severance of tenements in favour of a grantor or his assigns retaining or taking the *quasi*-dominant tenement, may be summarised as follows:—

(*a*) The case of absolute necessity.

(*b*) The case of mutual and reciprocal easements.

(*c*) The case of simultaneous conveyances, or of conveyances executed at different times but as part of the same transaction.

It is proposed to consider these exceptions in the above order.

(*a*) *Case of Absolute Necessity.*

Wheeldon v. *Burrows.*

This exception, which refers to ways of necessity, is fully dealt with by Thesiger, L.J., in *Wheeldon* v. *Burrows*,[2] and has already been considered in this chapter.[3]

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[1] *See supra*, where this case is considered, and *infra* in connection with the doctrine of "acquiescence."

[2] (1879) 12 Ch. D. at pp. 57 *et seq.*

[3] *Supra*, Part IV, A.

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(b) *Case of Mutual and Reciprocal Easements.*

Support of buildings by buildings.

Cases of mutual support of buildings by buildings are an illustration of this exception.[1] In such cases the easement is said to be reciprocal arising out of the mutual subservience to, and dependence on, one another of two houses, in which case the alienation of one house by the owner of both would not estop him from claiming, in respect of the house he retains, that support from the house sold, which is at the same time afforded in return by the former to the latter tenement.[1]

Suffield v. *Brown.*

In *Suffield* v. *Brown*,[2] Lord Chancellor Westbury points out the distinction that arises between a case such as that of mutual support and the case to which the general rule of express reservation is applicable. In the former case the right claimed in respect of the tenement retained is inseparable from it, but in the latter case, where the right is separable, it is severed by the grant and either passes to the grantee where the dominant tenement is granted, or is extinguished where the dominant tenement is retained.

Party-walls.

A similar exception arises in the case of the divided moieties of a party-wall.[3]

Easements of drainage.

It has been suggested that on a severance of tenements there might in special circumstances be presumed mutual and reciprocal easements of drainage in favour of grantor and grantee, and that on this ground the decision in *Pyer* v. *Carter*[4] might be supported without departing from the general maxims on which the judgment of the Court of Appeal in *Wheeldon* v. *Burrows* is based.[5]

Pyer v. *Carter.*

Wheeldon v. *Burrows.*

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[1] *Richards* v. *Rose* (1853), 9 Exch., 218; 23 L. J. Exch., 3; *Gayford* v. *Nicholls* (1854), 9 Exch., 702 (708); 23 L. J. Exch., 205; *Suffield* v. *Brown* (1864), 4 De G. J. & S. at p. 198; *Angus* v. *Dalton* (1877), 3 Q. B. D. at p. 116; (1878) 4 Q. B. D. at pp. 168, 182; *Wheeldon* v. *Burrows*, *ubi sup.* at p. 59; *Dalton* v. *Angus* (1881), 6 App. Cas. 792, 826.

[2] *Ubi sup.*

[3] *Jones* v. *Pritchard* (1908), 1 Ch., 630 (635, 636); 24 Times L. R., 309 (310).

[4] (1857) 1 H. & N., 916.

[5] *See* per Thesiger, L.J., in *Wheeldon* v. *Burrows*, *ubi sup.* at p. 59.

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(c) *Case of simultaneous conveyances of the severed tenements or of conveyances thereof at different times but as part of the same transaction.*

It is now settled law that when on a disposition of property belonging to the same owner, the severed tenements are conveyed either simultaneously or at different times but as part of one transaction, *quasi*-easements, apparent and continuous and necessary for the enjoyment of the severed tenements as they were enjoyed at the time of severance, will pass by presumption of law to the grantees thereof.[1]

Effect of such conveyances.

In either case the conveyances are regarded in equity as one transaction, and each grantee who takes his tenement with the knowledge that the other tenements are being conveyed at the same time or will be conveyed as part of the same transaction, is deemed, in the absence of express stipulation,[2] to take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to the different portions of his property before severance.

Barnes v. *Loach*.

Thus, it was said in *Barnes* v. *Loach*[3]: "If the owner of "an estate has been in the habit of using *quasi*-easements of "an apparent and continuous character over the one part for "the benefit of the other part of his property, and aliens the "*quasi*-dominant to one person and the *quasi*-servient to

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[1] *Palmer* v. *Fletcher* (1615), 1 Lev., 122; *Compton* v. *Richards* (1814), 1 Price, 27; *Swansborough* v. *Coventry* (1832), 9 Bing., 305; *Wheeldon* v. *Burrows* (1879), 12 Ch. D. at pp. 59, 60; *Barnes* v. *Loach* (1879), 4 Q. B. D., 494; *Allen* v. *Taylor* (1880), 16 Ch. D., 355; *Rigby* v. *Bennett* (1882), 21 Ch. D. at p. 567; *Phillips* v. *Low* (1892), 1 Ch., 47, and *see* the judgment of Lord Selborne in *Russell* v. *Watts* (1885), 10 App. Cas., pp. 602, 603. Nor will the fact that the *quasi*-dominant tenement is in lease at the time of severance prevent the *quasi*-easements attaching thereto from passing to the alienee, *Barnes* v. *Loach*, *ubi sup.*

[2] *See Haynes* v. *King* (1893), 3 Ch., 439. And the presumption may be wholly displaced or considerably modified by the surrounding circumstances existing at the time of severance and known to the grantee or devisee, *see Birmingham, etc., Co.* v. *Ross* (1888), 38 Ch. D., 295; *Myers* v. *Catterson* (1889), 43 Ch. D. 470; *Phillips* v. *Low* (1892), 1 Ch., 47; *Broomfield* v. *Williams* (1897), 1 Ch., 602; *Godwin* v. *Schweppes, Ltd.* (1902), 1 Ch., 926.

[3] (1879) 4 Q. B. D. at pp. 497, 498.

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"another, the respective alienees will, in the absence of express "stipulation, take the land burdened or benefited, as the case "may be, by the qualities which the previous owner had a "right to attach to them."

Allen v. Taylor.

In *Allen* v. *Taylor*,[1] Jessel, M.R., lays down the same rule. He says: "Supposing the owner of the land and the "house sells the house and the land at the same moment, "and supposing he expressly sells the house with the lights; "can it be said that the purchaser of the land is entitled to "block up the lights, the vendor being the same in each case, "and both purchasers being aware of the simultaneous con- "veyances? I should have said certainly not. In equity it "is one transaction. The purchaser of the land knows that "the vendor is at the same moment selling the house with "the lights, and as part of one transaction he takes the lands; "he cannot take away the lights from the house."

And again, after reviewing the authorities, he says[2]—

"The particular case before me is the strongest I ever "saw, for both of the purchasers were also vendors, and were "parties to both conveyances. It is not the mere case of a "vendor by contemporaneous conveyances selling to two "different purchasers, but the two purchasers were two of "the three trustees of a will, and an option was given to the "two purchasers, or either of them, to buy any part of "the real estate that they thought fit, notwithstanding they "were trustees; and then, by contemporaneous conveyances, "each with the assent of the other exercised his option as to "some of the houses and lands, for they both bought houses "and both bought lands. It is not like the case of a man "buying land alone or a house alone. The three trustees "conveyed to the purchaser, one trustee, land with a house "built upon it, together with the lights thereto belonging, "and all the estate. Can people who have been parties to "two transactions in this way say that they were otherwise "than one transaction, and that both parties who bought

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[1] (1880) 16 Ch. D., 355 (358).

[2] *Ibid.* at p. 359.

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"houses with lights were not to get the lights? It appears "to me, independently of authority, that in such a case as "this there is a manifest intention shewn that the houses "sold were to retain their lights, and that neither purchaser "could on his land erect any obstruction which would block "up or destroy the lights of his neighbour."

It is important to note that the rule applies not only in the case of simultaneous conveyances as in *Allen* v. *Taylor*, but also in the case of conveyances executed at different times but as part and parcel of the same transaction.[1] In such cases the conveyances are founded upon transactions which, in contemplation of equity, are equivalent to conveyances between the parties at the time the transactions were entered into, such transactions being entered into at the same moment of time and as part and parcel of one transaction.[2]

Same law in case of severance by will.

As in the case of contemporaneous grants by deed, so will *quasi*-easements arise on a severance of tenements by will, where the *quasi*-dominant tenement passes to one devisee and the *quasi*-servient tenement to another.[3]

III.—Acquisition of Quasi-Easements on a Partition of Joint Property.

On a severance of tenements by a partition of joint property, and in the absence of a contrary intention expressed or necessarily implied, all such easements as are apparent and continuous and necessary for enjoying any of the undivided shares when the partition was effected pass to the coparceners to whom such shares are respectively allotted in severalty.[4]

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[1] *See* per Thesiger, L.J., in *Wheeldon* v. *Burrows* (1879), 12 Ch. D. at pp. 59, 60; *Russell* v. *Watts* (1885), 10 App. Cas., pp. 602, 603. Conveyances executed more than a year apart and not arising out of the same transaction cannot be called simultaneous conveyances, *Rigby* v. *Bennett* (1882), 21 Ch. D. at pp. 565, 567.

[2] *Wheeldon* v. *Burrows* (1879), 12 Ch. D. at p. 60.

[3] *Barnes* v. *Loach* (1879), 4 Q. B. D., 494; *Phillips* v. *Low* (1892), 1 Ch., 47.

[4] *See* I. E. Act, s. 13 (*f*), App. VII; *Krishnamarazu* v. *Marraju* (1905), I. L. R., 28 Mad., 495 (497), and *see* to the same effect the cases cited *infra*.

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Such respective rights come into existence in the same way, and upon the same principles, as *quasi*-easements upon a severance by simultaneous conveyances of property previously held in sole possession or ownership.

Ratanji H. Bottlewalla v. *Edalji H. Bottlewalla*.

In *Ratanji H. Bottlewalla* v. *Edalji H. Bottlewalla*,[1] it was held that the easement of light and air there claimed, being of a continuous nature, passed by implication of law by the conveyance of the dominant tenement to the plaintiff upon a partition of joint property.

Purshotam Sakharam v. *Durgoji Tukaram*.

To the same effect is the decision in *Purshotam Sakharam* v. *Durgoji Tukaram*,[2] where the easement claimed was the right to discharge water from the dominant tenement on to the servient tenement.

As between coparceners, mutual conveyances of the shares allotted to them respectively upon a partition of joint property, whether under the direction of a Court of law or otherwise, will carry with them by presumption of law the right to such continuous easements as are necessary for the reasonable use and enjoyment of the premises respectively allotted.

Bolye Chunder Sen v. *Lalmoni Dasi*.

Upon this principle, easements of light and air were held in *Bolye Chunder Sen* v. *Lalmoni Dasi*[3] to pass to the different coparceners upon partition.

And in more recent cases it has been decided that the result is the same where the partition has not been affected by mutual conveyances but by decree of Court, whether in a contested suit,[4] or as recording the consent of parties to a partition,[5] and even though such decree makes no mention of easements.[6]

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[1] (1871) 8 Bom. H. C. (O. C. J.), 181. Easements of light and air will of course also pass under and by virtue of the usual general words contained in a deed of partition, *i.e.* "Together with all the "rights, easements, and appurtenances to "or with the same thereby granted or "any or any part of any of them now "or at any time belonging or reputed "to belong or enjoyed," *Ibid.*

[2] (1890) I. L. R., 14 Bom., 452.

[3] (1887) I. L. R., 14 Cal., 797.

[4] *Dwarkanath Paul* v. *Sunder Lall Seal* (1898), 3 Cal. W. N., 407.

[5] *Kadombini Debi* v. *Kali Kumar Haldar* (1899), 3 Cal. W. N., 409.

[6] *See* the two cases last cited.

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Part V.—Acquisition of Easements by operation of the doctrine of acquiescence.

The doctrine of acquiescence is an interesting feature of the law relating to the acquisition of easements. This method of acquisition has nothing in common with those methods of acquisition which have been considered in the first four parts of this chapter, but depends upon the previous conduct of the servient owner. The doctrine may be said to apply in those cases where the servient owner by active encouragement, passive acquiescence, or other conduct, has induced or permitted a belief on the part of the dominant owner, upon which he has acted, that by expending some money or doing some act, he will acquire an easement over the servient tenement.

Imputed grant.

In such cases equity forbids the servient owner to repudiate the obvious and plain consequences of his own conduct and imputes to him a grant of the easement.

Broad principle laid down in *Dann* v. *Spurrier*.

The broad principle underlying all these cases of acquiescence has been stated in the leading case of *Dann* v. *Spurrier*[1] to be that if one man stands by and encourages, though but passively, another to lay out money under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the Court will not permit any subsequent interference with such enjoyment.

Acquiescence must be in the nature of a fraud.

It has been said that the acquiescence which will deprive a man of his legal rights must be in the nature of a fraud.[2]

The elements or requisites necessary to constitute fraud

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[1] (1802) 7 Ves., 231; *see* also *Powell* v. *Thomas* (1848), 6 Hare, 300; *Rochdale Canal Co.* v. *King* (1851), 18 L. J. Q. B. (N. S.), 293; 2 Sim. N. S., 78; (1853) 22 L. J. Ch., 604; and *see Ramsden* v. *Dyson* (1866), L. R., 1 H. L., 129, where analogous principles are laid down, and *Sufroo Shaikh Durjee* v. *Futteh Sheikh Durjee* (1871), 15 W. R. 505.

[2] *See Wilmott* v. *Barber* (1880), 15 Ch. D. at p. 105.

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Wilmott v. *Barber*.

of this description are clearly stated by Fry, J., in *Wilmott* v. *Barber*[1]:—

First, the man claiming under the equity must have made a mistake as to his legal rights.

Secondly, he must have expended some money or must have done some act, not necessarily upon the other's land, on the faith of his mistaken belief.

Thirdly, the possessor of the legal right must know of the existence of his own right, which is inconsistent with the right claimed by the other. If he does not know it, he is in the same position as the other, and the doctrine of acquiescence is founded upon conduct with knowledge of legal rights.

Fourthly, the possessor of the legal right must know of the other's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights.

Finally, the possessor of the legal right must have encouraged the other in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

With this preliminary statement of general principles it will be instructive to examine the principal authorities in which this doctrine of acquiescence as relating to easements has been applied.

E. I. Co. v. *Vincent*.

In *The East India Company* v. *Vincent*[2] the defendant, an adjoining landowner, agreed with the Company's agent that the Company should have liberty to build with windows overlooking his land on condition the Company retained him in their services as a packer. To such condition the agent made no answer or objection and the Company proceeded to build. Subsequently the defendant, being dismissed from the service of the Company, proceeded to block up their lights by building a wall. A bill by the Company to have the wall pulled down was decided in their favour by Lord

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[1] *Ubi sup.* at p. 105. This statement of law was repeated by the same judge in *Russell* v. *Watts* (1884), 25 Ch. D. at pp. 585, 586, and has been followed in India in *Basvantapa* v. *Rana* (1884), I. L. R. 9 Bom., 86.

[2] (1740) 2 Atk., 82.

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Chancellor Hardwicke, who said that though the silence of the agent was an acquiescence binding his principals, and notwithstanding that the dismissal of the defendant was a breach of the agreement between him and the agent of the Company, yet the defendant was not justified in building a wall merely to block up the Company's lights, but that his remedy was by bill in that Court to establish the agreement.

The Lord Chancellor further observed that "there are several "instances where a man has suffered another to go on build- "ing upon his ground, and not set up a right till afterwards, "when he was all the time conversant of his right, and the "person building had not notice of the other's right, in "which the Court would oblige the owner of the ground to "permit the person building to enjoy it quietly, and without "disturbance. But these cases have never been extended "so far as where parties have treated upon an agreement "for building, and the owner has not come to an absolute "agreement; there, if persons will build notwithstanding, "they must take the consequence, and there is not such an "acquiescence on the part of the owner, as will prevent him "from insisting on his right."

George Clavering's case cited in *Jackson* v. *Cator*.

In *Jackson* v. *Cator*,[1] Lord Chancellor Loughborough referred during the argument for the plaintiff to the case of Mr. George Clavering in the following terms: "There "was a case, I do not know whether it came to a decree, "against Mr. George Clavering; in which some person was "carrying on a project of a colliery; and had to make a "shaft at a considerable expense."

"Mr. Clavering saw the thing going on; and in the "execution of that plan, it was very clear the colliery was "not worth a farthing without a road over his ground; and "when the work was begun, he said, he would not give the "road. The end of it was, that he was made sensible, I do "not know whether by a decree or not, that he was to give "the road at a fair value."

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[1] (1800) 5 Ves., 688.

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Rochdale Canal Co. v. *King.*

The Rochdale Canal Company v. *King*,[1] was a bill filed by the plaintiff Company against King and other defendants, who were millowners, for an injunction restraining them from using the water of the canal for any other purpose except for condensing steam in the engines used by them. Under the Act empowering the Company to make and maintain the canal, landowners, within a distance of twenty yards of the canal, had been given liberty to communicate with the canal by pipes and to draw from the canal such quantity of cold water as would be sufficient for the sole purpose of condensing steam used for working their steam engines, and for no other purpose.

The defendants who were the owners of two mills used the water for seventeen years for generating as well as condensing steam in their engines, and eventually this bill was filed to restrain them as aforesaid. It was held that as regards the first mill, the plaintiff Company could not restrain the defendants from using the water as they had done, as they had encouraged its construction, and that as regards the second mill, it being evident that the Company never intended to waive the protection of the Act, an injunction should be granted against the defendants restraining them amongst other things from taking any water from the canal other than for condensing steam, except by license of the plaintiffs.

Bankart v. *Houghton.*

The case of *Bankart* v. *Houghton*[2] is also an authority for the proposition that where a man acquiesces in and encourages the construction by another of works which he knows, or ought to know, is likely to occasion him injury by way of nuisance, he has no grounds upon which to go to the Court for an injunction to stop the works.

Davis v. *Marshall.*

In *Davis* v. *Marshall*[3] the plaintiff sued for the obstruction of his lights, the removal of support to his house, and the

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[1] (1853) 22 L. J. Ch., 604. *See* also same case reported (1851), 18 L. J. Q. B. (N. S.), 293; 2 Sim. N. S., 78.

[2] (1859) 27 Beav., 425.

[3] (1861) 7 Jur. N. S., 1247; s. c. *sub nom. Davies* v. *Marshall* (1861), 10 C. B., N. S., 697.

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obstruction of his chimney. The defendant pleaded equitably that she pulled down an ancient house and erected in its place a new one, that the plaintiff had notice thereof, and that the defendant had done this act with the knowledge, acquiescence, and consent of the plaintiff and on the faith that the plaintiff had consented to it.

The acquiescence and consent of the plaintiff were passive.

It was held that this was a good equitable plea, the facts stated amounting to a permission on the part of the plaintiff, and the obstructions and removal of support complained of being the natural consequences of the act so permitted.

Cotching v. *Bassett*.

In *Cotching* v. *Bassett*[1] there was a material alteration of ancient lights in the course of rebuilding the dominant tenement. The alteration was made upon notice to the servient owner and with the knowledge and under the inspection of his surveyor, but without any express agreement. Subsequently the defendant gave the plaintiff notice of his intention to build a party-wall, which, if erected, would wholly have excluded the light from certain of the plaintiff's windows.

The plaintiff accordingly sued for a perpetual injunction to restrain the defendant from so building. It was held that the case fell strictly within the principle of *Dann* v. *Spurrier*,[2] and that plaintiffs were entitled to a perpetual injunction against the defendant.

Davies v. *Sear*.

The same principle was applied in *Davies* v. *Sear*,[3] where Lord Romilly, M.R., said[4]: "A man cannot take the assign-
"ment of the lease of a house having an archway and road
"under it leading to a mews, and abstain from looking at the
"plan by which the adjoining ground is laid out, and intended
"to be built upon; he cannot stand quiet, and see it gradually
"become covered with houses, so that every access or means
"of communication with the mews is shut out except this
"one, which he had always known was intended to be used

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[1] (1862) 32 Beav., 101.
[2] (1802) 7 Ves., 231.
[3] (1869) L. R., 7 Eq., 427.
[4] At p. 433.

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"as a means of access, and then say 'this easement was not "'reserved, although there was an archway and road under "'the house.' It does not lie in his mouth to say 'I did not "'understand that you intended to use this mode of access, "'and still less did I understand that you intended to close "'all other means of access, and leave this as the only existing "'one.' This is a case where the slightest inquiry or the "most casual observation would have shewn the defendant if, "indeed, he did not all along, as I believe he did, know what "was intended."

Russell v. *Watts*, mutual accommodation.

In *Russell* v. *Watts*,[1] the Corporation of Liverpool were the owners in fee of a piece of land which they agreed to lease out for building purposes, the intention of the tenant being to construct one large building upon it, but in such a manner as to be capable of subdivision into a number of separate houses. In order to erect a building of the required size it became necessary for the tenant to raise money by mortgaging the land and building, and before such scheme of building could be carried out, it was necessary that the three parties concerned should concur, namely, the owners in fee, the tenants, and the mortgagees.

The scheme was in fact approved by them all, and the mortgagees and lessors either knew how the various blocks were to be constructed or left it to the builder to construct them as they were constructed, without troubling themselves about the matter.

In either case there was no question that they authorised the builder to construct the building as he did, and a particular block in such a way as that it should be dependent for light to some of its windows on adjacent blocks.

The question for decision in the suit was whether the mortgagees of the latter blocks could obstruct the windows of the former blocks. Bacon, V.C., thought by reason of their previous conduct they could not, and on appeal Lindley, L.J.,

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[1] (1884) 25 Ch. D., 559. *See* the judgments of Bacon, V.C., and Lindley, L.J., as bearing on the present subject.

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agreed with him, in opposition to the views of Cotton and Fry, L.JJ.

The conclusions arrived at by the Vice-Chancellor and Lindley, L.J., were confirmed by the House of Lords,[1] but on the somewhat different grounds already referred to.[2]

In regard to the question of acquiescence Lindley, L.J., said: "This is not the case of a vendor of a piece of land "attempting to derogate from his own grant."

"It is more like the case of several persons interested in "several pieces of land, all agreeing to build upon them in a "particular way, so as to accommodate one another, and one "of them afterwards, when the buildings are up, insisting on "rights which are quite inconsistent with the enjoyment of "the buildings as erected. There is no authority to shew "that in such a case any one of such persons could afterwards "build on his own land so as to obstruct his neighbour's "lights, and in the absence of such authority I am of opinion "that he cannot do so."

"In such a case, it appears to me that the cross easements "which are created in the first instance are impliedly granted "in equity, if not at law, and if such easements are apparent, "no purchaser can protect himself against them by alleging "he bought without notice of them."

"The principles of *Dann* v. *Spurrier*[3] and *Cotching* v. "*Bassett*[4] are in my opinion applicable to such a case."

Application of the doctrine in India.

In India the doctrine of acquiescence has been applied so as to preclude the owner of a private house, or his heirs, from establishing a claim thereto after it had been rebuilt and maintained by public subscription with the consent of the owner and had for a long time been used by the public as a house of prayer.[5]

And the same doctrine has recently received favourable, though extra-judicial, notice in the Bombay High Court.[6]

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[1] (1885) 10 App. Cas., 590.

[2] *Supra*, Part IV, B, I (*b*).

[3] *Ubi sup.*

[4] *Ubi sup.*

[5] *Sufroo Shaikh Durjee* v. *Futteh Shaikh Durjee* (1871), 15 W. R., 505.

[6] *See Chunilal Mancharam* v. *Manishankar Atmaram* (1893), I. L. R., 18 Bom., 618, and the *dicta* of Fulton, J., at pp. 629, 630.

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Extent of imputed grant.

The extent of the imputed grant is to be measured by the necessary, obvious, and plain consequences of the permitted or encouraged act.

It is reasonable that when a man acquiesces in a particular act he should be taken to have acquiesced in the obvious and plain consequences of that act, but it is also reasonable that a man cannot be taken to assent to what he cannot foresee.

Bankart v. *Houghton*.

The rule is well illustrated in the case of *Bankart* v. *Houghton*.[1]

The plaintiff was a copper manufacturer and the defendant was an occupier of farms in the neighbourhood of the works.

For the reduction of copper-ore the plaintiff at first used three roasting furnaces, the exhalations and deposits from which caused no material injury to the defendant's farms.

The roasting furnaces were subsequently increased to seven. Neither the defendant nor his predecessor took any legal steps to prevent the nuisance arising from the noxious vapours produced from the smelting of the copper or to stop them. Their attitude appears to have been one of passive non-interference.

The nuisance having increased, the defendant brought an action at law against the plaintiff for the injury done to his farms and recovered damages.

The plaintiff thereupon filed his bill to restrain the defendant from taking out execution in the action, and from all further proceedings therein and from commencing any other action at law against the plaintiff.

A motion was made for an injunction which was refused with costs.

The judgment of the Master of the Rolls is important, and certain passages may be usefully cited. He said, "The way "in which it is put for the plaintiff in equity is this: It is said

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[1] (1859) 27 Beav., 425. *See* also *Davis* v. *Marshall* (1861), 7 Jur. N. S., 1247; s. c. *sub nom. Davies* v. *Marshall* (1861), 10 C. B., N. S., 697; and the judgment of Lindley, L.J., in *Russell* v. *Watts* (1883), 25 Ch. D. at p. 579.

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"that in a district where the effects of copper smoke are widely "felt and plainly understood, a tenant who takes land adjoining "copper works or such works then in the course of erection "and who makes no objection to them, must be held to have "acquiesced not only in the evil produced by the works in the "course of erection, but also in all that which may hereafter be "produced by their extension; that the addition to the works "is the natural consequence of their existence, and that the "tenant cannot afterwards complain of the effects of the smoke, "which, flowing from the works then existing or thereafter to "be added, he must have foreseen and of which he did not "complain. . . . I think it impossible to be reasonably con- "tended, that, because a man has acquiesced in the erection "of certain works which have produced little or no injury, he "is not afterwards to have any remedy, if, by the increase of "the works, at a subsequent period, he sustains a serious "injury. . . ."

"I am unable to accede to the argument that the defendant "must be held to have foreseen and to have assented, as a "probable consequence to the great and injurious additions "which have been made to the works."

"The highest that it can be put is, that he assented to "what was done and to the consequences that were necessarily "to be derived from that, but no further."

"The consequences of going further would be most "injurious, and would be unwarranted by any authority I am "aware of."

"It would follow that a partial obscuration of ancient "lights, if assented to, involved a consent to their total "obscuration, and that any easement assented to might be "increased at the pleasure of the grantee, provided it could be "shewn that the increase was only a probable consequence of "the use of the easement, if found beneficial."

"But I do not assent even to the first limited statement of "the proposition. It may well be that a person's assent is "given under an erroneous opinion and view and in ignorance "of consequences. Is that mistake of fact to bind him from

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"thenceforward and for ever? I think not. . . . It is neces-
"sary, in order to avoid misconception as to the view which I
"have taken of the case, and the observations I have made
"on the ignorance of the consequences of his assent being not
"binding on the assenting party, to distinguish between the
"case where the consequences of the act assented to are
"obvious and plain, and another where they are necessarily
"doubtful. This may be easily illustrated; for instance, if
"a neighbour permit me to open a window overlooking his
"close, he knows the exact consequences of that permission,
"namely, that he is liable for ever after to be overlooked,
"and that he cannot afterwards so build on his close as to
"obscure that window. This is the extent of the injury
"which can be produced, and he cannot say that he did not
"foresee it."

"So also if he allow another a right of way across his
"meadow, he knows and can accurately estimate the extent of
"the injury that will result from such permission. But if a
"copyholder allows the lord of the manor to work the coals
"under the close of the copyhold, by offset out of the adjoining
"land, does it therefore follow that if the lord in winning the
"coals, works so near the surface as to destroy the farm
"buildings of the copyholder, he is to have no remedy at law
"for the injury done to him? Could the lord be permitted to
"allege in this Court, that the copyholder must have known
"that the coal lay near the surface, and that such a result was
"probable from its having often occurred in the neighbour-
"hood? Certainly not; but, in truth, all such illustrations
"present a weaker case than that before the Court, and the
"strongest illustration of the distinction to be taken in such
"cases appears to me to be the case of works erected which at
"first seem to be and are innocuous, and which afterwards, by
"addition, become seriously injurious to the proprietors of the
"neighbouring lands."

Question whether acquiescence affects the reversion.

In cases between a lessor and lessee the acquiescence of the former cannot affect or bind the reversion, or give the lessee any additional right because the latter knows what his

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title is and what his length of tenure in the land is, but where the reversioner has knowingly permitted a state of things affecting his reversion with an easement he will be as much bound by it as if he had been in possession and acquiesced in it.[1]

Assignee for value without notice.

The grant of an easement founded upon the equitable doctrine of acquiescence will not bind an assignee of the grantor for value without notice.[2]

Actual notice. Constructive notice.

The notice necessary to bind the assignee is not limited to actual notice of the grant contained in a conveyance or conditions of sale,[3] but may be "constructive" on the principle that when a person purchases property where a visible state of things exists which could not legally exist, or would be very unlikely to exist, without the property being subject to some burthen, he is taken to have notice of the nature and extent of that burthen.[4]

But this rule of constructive notice cannot be stretched to such a length as from the mere fact of existence of windows to put the purchaser upon inquiry as to the right to use them, for such a doctrine would be unreasonable and dangerous and tantamount to affecting a purchaser with notice of any agreement relating to any structure which he sees on the adjoining land.[5]

The case of windows merely is not a case where the visible state of things makes the existence of an easement extremely probable, for windows are often put in situations where they are liable to be obstructed, the owner being in hopes of coming to some arrangement about lights and taking his chance of acquiring a right to access of light by twenty years' enjoyment.[6]

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[1] *Duke of Beaufort* v. *Patrick* (1853), 17 Beav., 60. As to the case of a mortgagee, *see Mold* v. *Wheatcroft* (1859), 27 Beav., 510.

[2] *See* Gale on Easements, 8th Ed., at p. 69.

[3] *Duke of Beaufort* v. *Patrick*, *ubi sup.*

[4] *See Mold* v. *Wheatcroft*, *ubi sup.*; *Bankart* v. *Houghton* (1859), 27 Beav., 425; *Allen* v. *Seckham* (1879), 11 Ch. D., 790.

[5] *Allen* v. *Seckham*, *ubi sup.*

[6] *Ibid.*

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Part VI.—Acquisition of Easements by virtue of Legislative Enactment.

A.—Statutory Easements in India.

Easements acquired under a legislative enactment are conferred either in express terms or by necessary implication according to the intention of the particular Act.[1] It is proposed to refer shortly to the provisions of certain Indian Acts under which easements may be said to have been created in favour of individuals or Government in express terms or, by implication, according to the implied intention of the Act.

(1) *In favour of individuals.*

Land Acquisition Act (Mines), XVIII of 1885, s. 8.

As an instance of easements created by legislative enactment in favour of individuals may be mentioned the rights granted to owners, lessees, and occupiers of mines by the Land Acquisition Act (Mines), XVIII of 1885, an Act of the Governor-General in Council.

By section 8 of this Act it is provided that when by reason of the acquisition of land the working of any mines is prevented or restricted, the respective owners, lessees, and occupiers of the mines, if their mines extend so as to be on both sides of the mines the working of which is prevented or restricted, may, subject to certain limitations, cut and make such and so many airways, headways, gateways, or water-levels through the mines, measures, or strata the working whereof is prevented or restricted as may be requisite to enable them to ventilate, drain, and work their said mines.

This is an instance of the creation of easements by legislative enactment in express terms.

(2) *In favour of Government.*

Various instances occur in local Acts of the creation of easements in favour of Government.

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[1] See Goddard on Easements, 6th Ed., pp. 108, 194.

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The following instances may be mentioned:—

(1) Section 3 of the Ajmere Land and Revenue Regulation, II of 1877, provides for the rights of the ownership of Government in limes and quarries. Ajmere Land and Revenue Regulation, II of 1877, s. 3.

The first proviso in the section by providing for the payment of compensation to any person whose rights are infringed by the occupation or disturbance of the surface of the land occasioned by working the mines and quarries suggests the implied grant of easements necessary for the reasonable enjoyment of such mining and quarrying rights.

(2) By section 151 of the Central Provinces Land Revenue Act, XVIII of 1881, it is enacted that, subject to express provision elsewhere, the right to all mines, minerals, coals, and quarries, and to all fisheries in navigable rivers shall be deemed to belong to Government, and the Government shall have all powers necessary for the proper enjoyment of such rights. Central Provinces Land Revenue Act, XVIII of 1881, s. 151.

(3) Section 41 of the Punjab Land Revenue Act, XVII of 1887, provides that all mines, metals, and coals, and all earth . . . and gold workings, shall be deemed to be the property of Government, and the Government shall have all powers necessary for a proper enjoyment of its right thereto. Punjab Land Revenue Act, XVII of 1887, s. 41.

B.—Statutory Easements in England.

In England, illustrations of the creation of easements by Act of Parliament are to be found in the provisions of the Railway Clauses Consolidation Act, 1845, which give one railway company a limited power to run a portion of its traffic over the line of another railway company,[1] and in what are called the Canal Acts, which are private Acts authorising upon the payment of compensation the making of a canal through private lands,[2] or the making of a railroad to a canal through intervening lands.[3]

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[1] See Chitty's Statutes, 5th Ed., p. 66, under "Railways."

[2] See *Duke of Bunfort* v. *Patrick* (1853), 17 Beav., 60.

[3] See *Mold* v. *Wheatcroft* (1860), 27 Beav., 510.

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So, too, by awards made under the Inclosure Acts, easements may be acquired by allottees of land over the land of other allottees.[1]

So, too, by the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), provision is made for the acquisition by the undertakers of any mere easement, not being an easement of water, required for the purposes of the special Act.[2]

So, too, under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), where private owners are willing to allow pipes through their land, a bargain is generally made for the easement or way-leave merely.[3]

So, too, by the same Act the right is given to lay pipes in public streets and roads upon certain conditions being observed.[4]

So, too, under the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), a sanitary authority may purchase an easement of support and nothing more.[5]

So, too, under and by the Electric Lighting Acts, 1882 (45 & 46 Vict. c. 56) and 1899 (62 & 63 Vict. c. 19), easements may be acquired and are given for the purpose of carrying into effect the objects of the undertaking.[6]

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[1] *See* Goddard, 6th Ed., 194, 195.

[2] S. 10. And *see* Michael and Will on The Law relating to Gas and Water, 5th Ed., 68.

[3] S. 29. And *see* Michael and Will, *ubi sup.*, 243, 244.

[4] S. 28. And *see* Michael and Will, *ubi sup.*, 243.

[5] Michael and Will, *ubi sup.*, 243.

[6] *See* Will on The Law relating to Electric Lighting, Traction, and Power, 3rd Ed., 56, 58, 101, 106, 107, 133, 212.

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CHAPTER VII.

Acquisition of Easements—(*Continued*).

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Acquisition of Easements—(*Continued*).

It is thought desirable to devote a separate chapter to the interesting and important subject of prescription.

In this connection will be considered the history and doctrine of prescription in England and India and the provisions of the Indian Limitation and Indian Easements Acts. The provisions of the English Prescription Act, so far as they coincide with those of the Indian enactments, will also be examined with the aid of the leading English authorities in the hope that they may throw some light on the meaning and intention of the Indian Legislature.

Part I.—By Prescription.

A.—Prescription Generally.

Definition of Prescription.

Prescription has been defined to be "a title taking his "substance of use and time allowed by the law."

"*Præscriptio est titulus ex usu et tempore substantiam "capiens ab authoritate legis.*" [1]

Dalton v. Angus.

"Prescription," says Lord Blackburn in *Dalton* v. *Angus*,[2] "is not one of those laws which are derived from natural "justice. Lord Stair, in his Institutions, treating of the law "of Scotland, in the old customs of which country he tells us "prescription had no place (book 2, tit. 12, s. 9) says, I think "truly, 'Prescription although it be by positive law founded "'upon utility more than upon equity, the introduction where-"'of the Romans ascribed to themselves, yet hath it been since "'received by most nations, but not so as to be counted "'amongst the laws of nations, because it is not the same, "'but different in diverse nations as to the matter, manner, "'and time of it.'"

History of Prescription.

To the Roman lawyers prescription was known by the name of *Usucapio*, and was defined as "adjectio domini per "continuationem possessionis temporis lege definiti." [3]

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[1] Coke, 1 Inst., 113 *b*.

[2] (1881) 6 App. Cas. at p. 818.

[3] Dig. Lib. 41, tit. 3.

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Roman Law.

By the old Roman law as enunciated in the Twelve Tables, and in Rome modified, and in the provinces practically superseded, by the equitable edicts of the Praetors, the true owner of the *dominium* or legal estate was deprived of it by an adverse possession for two years provided such possession was peaceable, open, and not fraudulent.

Any possession once obtained *nec vi*, *nec clam*, *nec precario* could not be disturbed by force.[1] On the basis of these principles was established principally, but not exclusively, the "*præscriptio longi temporis.*"

This was changed by Justinian, who published a constitution by which, throughout the Empire, twenty years in the case of absent parties, and ten years in the case of those present, were fixed as the period of possession that must elapse before the use or possession was clothed with the title.[2]

French Law.

In the numerous provinces into which *France* before the Revolution was divided, many of which were governed by their own customs, the law of prescription varied. *Domat* in his treatise on the Civil Law says: "It is not necessary to consider "the motives of these different dispositions of the Roman law, "nor the reasons why they are not observed in many of the "customs. Every usage hath its views, and considers in the "opposite usages their inconveniences. And it sufficeth to "remark here what is common to all these different disposi-"tions of the Roman law, and of the customs as to what "concerns the times of prescriptions. Which consists in two "views; one, to leave to the owners of things, and to those "who pretend to any rights, a certain time to recover them, "and the other to give peace and quiet to those whom others "would disturb in their possessions or in their rights after "the said time is expired."[3]

The Code Napoleon had to supply one law for all *France*.

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[1] Dig. Lib. 43, tit. 24, art. 1; Dig. Lib. 43, tit. 26, art. 2; Dig. Lib. 43, tit. 17.

[2] Inst., Just., Lib. 2, tit. 6.

[3] Book 3, tit. 7, s. 4. Translation by Doctor *Strahan*.

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Servitudes were divided into classes, continuous and discontinuous, apparent and non-apparent.

The first Projet of the Code allowed continuous servitudes, whether apparent or not, and discontinuous servitudes, if apparent, to be gained by title or by possession for thirty years. The *Code Civil*, as it was finally adopted by Article 690, allows servitudes, if continuous and apparent, to be acquired by title or by possession for thirty years, and by Article 691 enacts that continuous servitudes, not apparent, and servitudes discontinuous, whether apparent or not, can only in future be established by titles, but saves vested rights already acquired.

B.—Prescription in England.

Origin of prescription in English Law.

The English law as to prescription is, without doubt, chiefly derived from the Roman law, but as the legal system of every country is founded on its own notions of expediency, it becomes necessary to examine the English law and the principles upon which it rests.

By the law of England the ownership of real property has always been jealously guarded.

The maxim which has passed into a proverb that "every "man's house is his castle and fortress for defence or for "repose" exemplifies the sanctity with which the English law invests rights of ownership.

A man may do what he pleases with his own property, and he incurs no liability for any use he may make of it, so long as such use causes no injury to any one else.

No one has a right to set foot within the limits of his land without his express, or implied, consent.

He may build on his land in any way or to any height he pleases. He has a right to the continuous flow of streams passing through it. He may put it to wasteful or deteriorating uses, for he is his own master and no one can question what he does.

These and other rights of an absolute character the law annexes to the ownership of land, and *primâ facie* every owner is presumed to possess them.

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But though the law regards the ownership of land with a watchful eye and gives protection to those rights and advantages which are bound up with the full and unrestricted enjoyment of it, yet, under certain circumstances, and after the lapse of a particular period of time, another may claim to have deprived the owner of these rights, of some, or all of them.

The man who claims to prevent another from exercising the ordinary rights of ownership must found the claim upon some title which the law will recognise, and in order to do this he must shew how such title originates.

Now it happens in many cases that a man finds himself in the position of being compelled to state that in proof of the right claimed by him, he and his predecessors have exercised the right for generations, though how the right was first acquired he is unable to say.

User.

It was to help parties in such a position that the doctrine of prescription was first invoked, and the effect of such doctrine was to release such parties from the obligation of shewing the origin of the right claimed, provided that they could prove the exercise or enjoyment of it in a particular manner and for a particular time. If they succeeded in this, they were presumed to have acquired the right. Thus it has been said in Coke's First Institutes that "prescription is a title taking his "substance of use and time allowed by the law. *Præscriptio* "*est titulus ex usu et tempore substantiam capiens ab authoritate* "*legis.*"

Prescription under the common law.

Length of user.

It is evident that the *length* of the user as well as its character is a powerful element in the law of prescription, for as the saying goes, "ambiguity of time fortifieth all titles and "supposes the best beginning the law can give them."[1] In this respect it is interesting to trace the development of a doctrine which, introduced in early times, passed through successive stages of judicial treatment until it acquired its

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[1] *Per* Lord Hobart in *Slade* v. *Drake*, Hob., 295, cited in *Ellis* v. *Mayor of Bridgnorth* (1863), 15 C. B. N. S. 52.

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present form at the hands of the Legislature in the English Prescription Act.

Immemorial user.

At the common law, in the first stage of the doctrine, there appears to have been no fixed period of prescription, but rights were acquired by prescription when possession or enjoyment had existed beyond the memory of man, or where, as the legal phrase was, "the memory of man ran not to the contrary."

The fact of immemorial user being one of the requisites for the acquisition of a prescriptive right aptly illustrates the extreme dislike with which the English law has always regarded any interference with the ordinary rights of property.

Even after the introduction of this rule it was not admitted that such user gained the right, but that it supplied the place of the proof of origin which was wanting.[1]

It cannot be too clearly understood how entirely opposed to the theory and doctrine of prescription, is the view that it is the user which gains the right. User, no doubt, plays an important part in prescription, but it does so not as bestowing the right, but as affording the presumption of a lost grant from which the right can be inferred. Prescription in reality has never been anything more than the presumption of a grant, and it is erroneous to suppose that the fiction of a lost grant is a modern device. It was merely the old rule of prescription in a new dress.

Read v. *Brookman*.

In 1789 Buller, J., in his judgment in *Read* v. *Brookman*,[2] said: "For these last two hundred years it has been considered as clear law that grants, letters patent, and records, "may be presumed from length of time. It is so laid down "in Lord *Coke's* time, 12 Rep., 5, as undoubted law at that "time; and in modern times it has been adopted in its "fullest extent. The Mayor of *Kingston-upon-Hull* v. *Horner*, "Cowp., 102; *Powell* v. *Milbanke*, ante, 1 vol., 399 *n*, and the

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[1] *See* rule as to prescription stated in Sir Francis North's argument in *Potter* v. *North* (1669), 1 Ventr., 387, cited by Lord Selborne in *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 795.

[2] (1789) 3 Term. Rep. 151 (158).

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"*King* v. the Archbishop of *Canterbury* (Tr. 11 & 12 Geo. 2, "B. R.); where Lee, C.J., said, here is an uninterrupted "usage since 1278, and there cannot be a stronger pre- "scription of a grant. So in *Hasselden* v. *Bradney* (Tr. 4 "Geo. 3, C. B.), a jury may find a recovery upon pre- "sumption. So that there never appears to have been any "doubt on this point."

By various statutes,[1] fixed periods were limited for the bringing of actions for the recovery of real estate, and these continued in force until the statute of Westminster, 3 Edw. I, c. 39, 1275.

By this statute the period of bringing a writ of right was limited to the time of King Richard I, a period of eighty-eight years, or as commencing from the year 1189. Writs of mort d'ancestor, etc., were limited to the coronation of Henry III, about fifty-eight years. The writs of novel disseisin remained subject to the same limitation as before, namely, to the passage of Henry III into Gascony.[2] Although this statute referred solely to actions for the recovery of real estate, the judges by an assumption of legislative authority proceeded to apply the statutory prescriptive rule to incorporeal hereditaments, and, amongst others, to easements.

In course of time, the limitation thus fixed became attended with the inconvenience and hardship caused by the impossibility of carrying back the proof of possession or enjoyment to a period, which, after one or two generations, ceased to be within the reach of evidence.

Here, again, the judges came to the rescue and provided a remedy by holding that if the proof was carried back as far as *living* memory would go, it should be presumed that the right

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[1] Before the statute of Merton the limitation in a writ of right, according to Bracton, was from the time of Henry I, that is, from the year 1100, or 135 years. By the statute of Merton, 20 Henry III, c. 8, limitation in a writ of right was from the time of Henry II, a period of seventy years.

[2] Writs of mort d'ancestor and of entry were not to exceed the last return of King John from Ireland, a period of twenty-five years. Writs of novel disseisin were to be limited to the first voyage of the King into Gascony, a period of fifteen years.

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claimed had existed from the time of legal memory, that is to say, from the time of Richard I or the year 1189.

No further change took place in the law until the passing of the statute of Jac. I, c. 21, notwithstanding the statute of 31 Hen. VIII, c. 2, by which the time for bringing a writ of right was limited to sixty years, and an opportunity was given to the Courts to apply by analogy its provisions to the case of easements. The statute of Jac. I, c. 2, limited the time for bringing a possessory action to twenty years, and judges by another bold assumption of the functions of the Legislature availed themselves of the opportunity afforded by this statute to adopt the last-mentioned period as sufficient to found a presumption of the existence since legal memory of the right claimed.

But in no case was the presumption conclusive, and none of these changes in the law, important as they were in reducing the period of prescription to narrower and more certain limits, were of any avail in removing the obstacle to the acquisition of the right claimed, which appeared as soon as there was proof of an origin later than legal memory, inasmuch as, if in the course of a cause it was shewn that the disputed right had had such later origin, the presumption failed, and the claim of right was defeated.

Fiction of a lost grant.

It is evident that this latitude in rebutting the presumption allowed to the person contesting the right was in many cases productive of great hardship and injustice to the party claiming it and frustrated the very object of prescription, which is the protection of titles after long possession.

In order to remedy this defect in the law, resort was had to the doctrine of a lost grant, a fiction which appears to have been created on the principle that, independently of prescription, every incorporeal hereditament must have had its origin in grant.

By this device user of the right, at first for living memory and, afterwards, for twenty years under the statute of James I, raised the presumption that it had been granted by a deed which in the lapse of time had been lost.

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Effect of the device.

This device appears to have been as much to the disadvantage of the party contesting the right, as the former possibility of proof of an origin later than legal memory was to that of the person claiming it, for proof of user at first for legal memory and afterwards for twenty years negatived any evidence of an origin later than legal memory by reason of the presumption that the user had commenced under a deed which had since been lost.

It should be observed that in earlier times it was essential to the application of this doctrine that a grant should be thought to have been really made and afterwards lost or destroyed by accident, and it was the business of the jury to decide whether the making and subsequent loss or destruction had been fairly proved by the evidence.[1]

As the doctrine was extended in later times the attention of the Courts seems to have been fixed on the length of the user or enjoyment of the right conferred by the deed rather than on the deed itself, or the evidence which proved its destruction or loss. Thus, gradually, it came about that the loss of the deed was not so much proved as presumed from the assertion to that effect of the party claiming under it.

As applied to easements the doctrine was based wholly on fiction, and juries were directed to find in favour of a lost grant where it was clear that no grant had ever existed.

Of this doctrine, while its utility is admitted, it has been said that its introduction was "a perversion of legal principles "and an unwarrantable assumption of authority."[2]

Its effect on the law of prescription was indirectly to convert the rebuttable presumption formerly raised by proof of actual user into a practically conclusive one, and it thus became a method of shortening the period of prescription.[3]

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[1] *Leyfield's case* (1611), 10 Rep., 92.

[2] 2 Ev. Poth., 139.

[3] The former presumption rebuttable by proof of origin of the easement within the period of legal memory gave place to a presumption which could be rebutted neither by proof of the origin of the easement within the period of legal memory, nor by proof of such circumstances as negatived an actual assent on the part of the servient owner to the enjoyment of the easement claimed, nor by evidence of dissent short of actual interruption of, or obstruction

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In the case of *Angus* v. *Dalton*,[1] already considered at length in reference to the easement of support, the doctrine of a lost grant and the evidence necessary to rebut its presumption were the subjects of elaborate discussion in all the three Courts before whom the case was heard, and the opinion formed by a majority of the judges was that the presumption of a lost grant founded on long enjoyment is so far conclusive as not to be rebuttable by proof that no grant has in fact been made. *Angus* v. *Dalton*.

But legal incompetence as regards the servient owner to grant an easement, or a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements, will prevent the presumption of an easement by lost grant.[2]

In the early part of the nineteenth century, when war was made on all legal fictions and that of a lost grant fell into disfavour, the Legislature determined to remove the blot on the administration of justice which arose from thus forcing the consciences of juries, and to substitute a direct for an indirect method of lessening the period of prescription. English Prescription Act.

This was the chief aim and object of Lord Tenterden's Act, otherwise known as the English Prescription Act, 2 & 3 Will. IV, c. 71.

In *Mounsey* v. *Ismay*,[3] Martin, B., declares the occasion of the enactment of the Prescription Act to be well known. He says: "It had been long established that the enjoyment of an "easement as of right for twenty years was practically conclu- "sive of a right from the reign of Richard the First, or, in *Mounsey* v. *Ismay*.

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to, the enjoyment, nor by mere proof by the servient owner that no grant was in fact made either at the commencement, or during the continuance, of the enjoyment; *see* the judgment of Thesiger, L.J., in *Angus* v. *Dalton* (1878), 4 Q. B. D., pp. 171 *et seq.* Thus, though the evidence of enjoyment was in theory merely presumptive evidence, in practice and effect it was a bar; *see Bright* v. *Walker* (1834), 1 C. M. & R. at p. 217; 40 R. R. at p. 542.

[1] (1878-1881) 3 Q. B. D., 85; 4 Q. B. D., 162; *Dalton* v. *Angus*, 6 App. Cas., 740.

[2] *See Angus* v. *Dalton* (1878), 4 Q. B. D. at p. 175.

[3] (1865) 3 H. & C., 486; 34 L. J. Exch., 52.

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"other words, of a right by prescription (except proof was "given of an impossibility of the existence of the right) from "that period. A very common mode of defeating such a right "was proof of unity of possession since the time of legal "memory."

"To meet this the grant by a lost deed was invented, but "in progress of time a difficulty arose in requiring a jury to "find upon their oaths that a deed had been executed which "every one knew never existed, hence the Prescription Act."

Section 2. By section 2 of the Prescription Act, claims to any way or other easement, or to any watercourse, or the use of any water after actual enjoyment by any person claiming right thereto without interruption for twenty years are not to be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but such claims are made defeasible as formerly after twenty years' actual enjoyment and without interruption, and by the same section, when such way or other matter shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto is to be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.[1]

Section 3. By section 3 of the same statute,[2] subject to a like proviso,[3]

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[1] *See* App. I. As to the words "agreement expressly made by deed," *see Haynes* v. *King* (1893), 3 Ch., 439, and *cf.* corresponding provision in Indian Easements Act, s. 15, Expl. I. and App. VII; and *see Sultan Nawaz Jung* v. *Rustomji Nanabhoy* (1899), I. L. R., 24 Bom. (P. C.), 156; L. R., 26 Ind. App., 184. An express agreement in writing signed simply by the owner of the dominant tenement, and not by the owner of the servient tenement, has been held to be a good agreement within the proviso, *Bewley* v. *Atkinson* (1879), 13 Ch. D., 283. As to what is sufficient to affect the assignee of the servient owner with constructive notice of the agreement, *see Allen* v. *Seckham* (1879), 11 Ch. D., 790.

[2] *See* App. I.

[3] *I.e.* enjoyment by some consent or agreement, etc., *see* section 2. An exception in a grant enabling the grantor to do something which he would otherwise be unable to do, as being in derogation of his own grant, will not prevent the grantee from acquiring a right to light *aliunde*—for instance, by the operation of the statute—and is, therefore, not within the proviso, *see Mitchell* v. *Cantrill* (1887), 37 Ch. D., 56. It seems that a tenant in occupation of the dominant tenement is competent to give

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a right to light becomes absolute and indefeasible after twenty years' actual enjoyment without interruption.[1]

Sections 2 and 3 must be read with section 4.

But these sections must be read with section 4,[2] with the result that the above-mentioned periods cannot be taken as periods in gross, but as periods next before some suit or action wherein the claim or matter to which such periods may respectively relate shall have been or shall be brought into question.

Until this is done no title is acquired under the Act, and the right remains merely inchoate.[3]

Prescription Act not exclusive.

The Prescription Act has not taken away any of the modes of claiming easements which existed before the statute. They may still be utilised, but instances of claims based on them are much fewer.

Recourse may still be had to the common law method of prescription by immemorial user, and the fiction of a lost grant when, owing to recent interruption, a prescription under the statute next before action brought cannot be made out.[4] But if the claimant chooses to base his title to any easement contemplated by the Act, upon the old common law method of immemorial user, he is of course liable to be defeated, as formerly, by proof of a modern origin.[5]

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the requisite "consent or agreement," although he may thereby prejudicially affect his landlord's inchoate right, *Hyman* v. *Van der Bergh* (1908), 1 Ch., 167 ; but a mere casual occupant cannot do so, *Ibid.* at p. 179.

[1] Literally construed, the words "*the* light" would mean all the light which for twenty years has existed in the surroundings of the tenement which has enjoyed it, but it has been held that this is not the true construction, *see supra*, Chap. III, Part I, and *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at p. 183.

[2] For the text of the section, *see* App. I, and for a commentary thereon, *see infra*.

[3] *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at pp. 189, 190 ; *Hyman* v. *Van der Bergh* (1908), 1 Ch. 167. And *see* further *infra* in connection with the construction of s. 4 and the cases there cited.

[4] *Bagram* v. *Khetranath Karformah* (1869), 3 B. L. R., O. C. J. at p. 25 ; *Ponnuswami Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C. at p. 21 ; *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad. at p. 338 ; *Warrick* v. *Queen's College, Oxford* (1871), L. R., 6 Ch., App., 728 ; *Aynsley* v. *Glover* (1875), L. R., 10 Ch. App., 283 ; *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 844. And *see* Gale on Easements, 8th Ed., pp. 199, 200.

[5] *See supra*.

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Effect of the Act.

In reality the Act did nothing more than shorten the period of prescription in certain cases. It was passed, as its preamble declares, in order to put an end to the inconvenience and injustice of the old common law rule of immemorial user and the subsequent fiction of a lost grant, and it provided another and more convenient mode of acquiring easements.[1]

But in altering the mode of proof it has made no difference in the right conferred.[2]

The Act neither enlarges the right of the dominant tenement nor adds to the burthen of the servient tenement.[3]

Its effect is simply this: when the easement has been enjoyed for the full period which before the Act was supposed to be sufficient to support a prescriptive claim, and the right is then brought into question, (for until then the origin of the right continues just the same as if the Act had never been passed, and no title has been acquired thereunder), it avoids and extinguishes every adverse plea not founded upon an agreement or consent in writing.[4]

Regarding the Prescription Act as an act of procedure (and the preamble supports this view),[5] it is clear that one of the results of the statute has been largely to supersede the old system of pleading.

Under the statute, prescription has become a matter *juris positivi*, and does not require, and, therefore, ought not to be rested on, any presumption of grant or fiction of license having been obtained from the person contesting the right or his predecessors in title.[6]

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[1] *See Arzan* v. *Rakhal Chunder Roy Chowdhry* (1883), I. L. R., 10 Cal., 214 (217); *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839 (855); *Bright* v. *Walker* (1834), 1 Cr. M. & R. at p. 218; 40 R. R. at p. 542; *Angus* v. *Dalton* (1877), 3 Q. B. D. at p. 105; *Gardner* v. *Hodgson's Kingston Brewery* (1903), App. Cas. at p. 236.

[2] *Per* Lord Halsbury in *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at p. 183; and *see per* Garth, C.J., in *Arzan* v. *Rakhal Chunder Roy Chowdhry, ubi sup.*

[3] *Per* Lord Macnaghten in *Colls* v. *Home and Colonial Stores, Ltd.*, *ubi sup.*, at pp. 190, 191.

[4] *Ibid.* at pp. 189, 190, rejecting the qualification suggested by Bowen, L.J., in *Scott* v. *Pape* (1886), 31 Ch. D. at p. 571.

[5] *See* App. I.

[6] *See Tapling* v. *Jones* (1865), 11 H. L. C., 290.

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But questions of procedure or pleading do not affect the theory that every easement must arise with the knowledge and consent of the servient owner, express or implied. Acquiescence at the root of prescription.

"Consent or acquiescence," said Thesiger, L.J., in delivering the judgment of the Court of Appeal in *Sturges* v. *Bridgman*,[1] "of the owner of the servient tenement lies at the root of prescription and of the fiction of a lost grant." *Sturges* v. *Bridgman*.

In *Dalton* v. *Angus*,[2] Fry, J., expressed the opinion that the whole law of prescription and the whole law which governs the presumption of inference of a grant or covenant rest upon acquiescence. *Dalton* v. *Angus*.

He said: "It becomes then of the highest importance to "consider of what ingredients acquiescence consists. In "many cases, as for instance, in the case of that acquiescence "which creates a right of way, it will be found to involve, "first, the doing of some act by one man upon the land of "another; secondly, the absence of right to do that act in the "person doing it; thirdly, the knowledge of the person "affected by it that the act is done; fourthly, the power of "the person affected by the act to prevent such act either by "act on his part or by action in the Courts; and lastly the "abstinence by him from any such interference for such a "length of time as renders it reasonable for the Courts to say "that he shall not afterwards interfere to stop the act being "done."

"In some cases as, for example, in the case of lights, some "of these ingredients are wanting; but I cannot imagine "any case of acquiescence in which there is not shewn to be in "the servient owner: 1, a knowledge of the acts done; 2, a "power in him to stop the acts or sue in respect of them; and "3, an abstinence on his part from the exercise of such power. "That such is the nature of acquiescence and that such is the "ground upon which presumptions or inferences of grant may "be made appears to me to be plain, both from reason, from

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[1] (1879) 11 Ch. D., 852 (863); cited by Fry, J., in *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 774.

[2] *Ubi sup.*, at pp. 773, 774.

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"maxim, and from the cases. As regards the reason of the "case it is plain good sense to hold that a man who can stop "an asserted right or a continued user, and does not do so for "a long time may be told that he has lost his right by his "delay and by negligence, and every presumption should "therefore be made to quiet a possession thus acquired and "enjoyed by the quiet consent of the sufferer. But there is no "sense in binding a man by an enjoyment he cannot prevent, "or quieting a possession which he could never disturb. "'*Qui non prohibet quod prohibere potest, assentire videtur:*' "'*contra non valentem agere, nulla currit prescriptio,*' are two "maxims which shew that prescription and assent are only "raised where there is a power of prohibition."

In the same case[1] Lord Blackburn preferred laches to acquiescence as a possible ground upon which to found prescription; but he declined to regard it as the only ground.

He thought a failure to interrupt, when there is a power to do so, might well be called laches, and it seemed far less hard to say that for the public good and for the quieting of titles enjoyment for a prescribed time should bar the true owner when the true owner had been guilty of laches, than to say that for the public good the true owner should lose his rights if he had not exercised them during the prescribed period, whether there had been laches or not. But in either case he thought there was not much hardship. Presumably such rights if not exercised were not of much value, and though sometimes they were, "*Ad ea quae frequentius accidunt jura adaptantur.*"

But if, according to Lord Blackburn, prescription being a positive law differing in matter, manner, and time in different countries, is founded on a broader principle than that of acquiescence solely, it is at any rate the generally accepted view at the present time that acquiescence is an all-important element in prescription.

From the acquiescence of the servient owner is deduced

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[1] (1881) 6 App. Cas. at pp. 817, 818.

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the grant of the easement.[1] Thus, in legal conception, all the different modes in which easements are acquired are in reality reducible to one, that of grant.

Rangeley v. *Midland Railway Company*.

In *Rangeley* v. *Midland Railway Company*,[2] Lord Justice Cairns said, "every easement has its origin in a grant ex- "pressed or implied."

Prescription must be lawful in its inception.

And so it is that just as a grant which is unlawful or illegal is void, so must prescription have a lawful beginning.[3] "For such things as can have no lawful beginning, nor be "created at this day by any manner of grant, or reservation, "or a deed that can be supplied, no prescription is good."[4]

Character of user in prescription.

Though it is essential to prescription that there should be acquiescence on the part of the servient owner it is equally important that the user or enjoyment of the inchoate right on the part of the dominant owner should fulfil the conditions contained in the words "*nec clam, nec vi, nec precario*," that is, should be "open, peaceable, and as of right."[5] And this rule applies both to affirmative and negative easements.[6]

Dalton v. *Angus*.

"The cantilena *nec clam, nec vi, nec precario*," says Bowen, J., in *Dalton* v. *Angus*,[7] "is a doctrine not peculiar "to affirmative easements, though we are chiefly familiar with "it in that chapter of the law of England. It seems in truth a "natural condition of any inchoate user which is to mature by "length of time and apart from statute into the presumption "of a right acquired at a neighbour's expense."

The theory which underlies the whole law of prescription is that the right has been granted for valuable consideration and a conveyance of it made before the commencement of the user.

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[1] *See per* Thesiger, L.J., in *Angus* v. *Dalton* (1873), 4 Q. B. D. at p. 173.

[2] (1868) L. R., 3 Ch. App., 306 (310).

[3] *Gateward's case* (1607), 6 Coke Rep., 59; Sir Francis North's argument in *Potter* v. *North* (1669), 1 Vent., 387; *Neaverson* v. *Peterborough Rural District Council* (1902), 1 Ch., 557; *Att.-Genl.* v. *Antrobus* (1905), 2 Ch., 188 (198).

[4] Sir Francis North's argument, *ubi sup.*

[5] *Bright* v. *Walker* (1834), 1 C. M. & R., 219; 40 R. R., 536; *Tickle* v. *Brown* (1836), 4 A. & E., 369; *Sturges* v. *Bridgman* (1879), 11 Ch. D., 852; *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 785; Prescription Act, s. 5, *see* App. I.

[6] *Sturges* v. *Bridgman*, *ubi sup.*

[7] (1881) 6 App. Cas. at p. 785.

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Supposing that to have been actually done, how would the purchaser have used or enjoyed the right? It might well be assumed that he would have done so openly, at all seasons and at all times, and whenever he chose. He would not have done so in a secret or stealthy manner as if he were doing something he ought not to do.

He would have enjoyed it peaceably, because if any one had disturbed or injured him in the exercise of the right he would have had his legal remedy against him. It was user of this character which, prior to the Prescription Act, the law required in order to raise a conclusive presumption of grant, and it is a similar user that the law now requires under the statute to make the right absolute and indefeasible.

The real question in each case of alleged prescription is whether the user or enjoyment is in all respects the same as it would have been, if at the commencement of, or previous to, the period of such user of enjoyment, the right in dispute had been bought and paid for.

Enjoyment must be peaceable.

Returning to the above-mentioned requisites of a valid enjoyment; first, the *enjoyment should be peaceable*.

This means that the person claiming the easement must be able to shew that he has enjoyed it during the prescriptive period without any interruption or opposition on the part of the servient owner sufficient to defeat the enjoyment.

Briefly, the user must not be a contentious one. Thus, where an action was brought for the disturbance of a right to draw water from a watercourse, and it was proved that the plaintiff had been in the habit of drawing off the water for his own purpose and that the owners of the watercourse had resisted and had his servants fined for doing so, and that they having been defended by the plaintiff had not appealed, it was held that this conviction unappealed against was evidence of an acknowledgment by the plaintiff that the enjoyment had not been as of right.[1]

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[1] *Eaton* v. *Swansea Waterworks Co.* (1851), 17 Q. B., 267. Effective interruption must consist in doing some act on the servient tenement in the case of

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Secondly, *the enjoyment must be open*. As it is essential that the enjoyment of an easement during the prescriptive period should be uninterrupted, so is it equally essential that the enjoyment should be capable of interruption. Enjoyment must be open.

And in order that the enjoyment should be capable of interruption, it is essential that the enjoyment should be open.

A man cannot resist or interrupt that of which he has no knowledge, either actual or constructive.

And if he cannot resist or interrupt it he cannot be said to consent to, or acquiesce in it, and it has been seen that consent or acquiescence lies at the root of prescription.

Knowledge, power to interrupt, and abstention from so doing on the part of the servient owner are three necessary elements in the acquisition of easements by prescription.

On this subject it will be useful to quote passages from some of the leading authorities to shew how the openness of the user or the capability of interruption has always been insisted on as a necessary ingredient in prescription.

"Although," says Lord Campbell in *Humphries* v. *Brogden*,[1] *Humphries v. Brogden.*
"there may be some difficulty in discovering whence the grant
"of the easement in respect of the house is to be presumed,
"as the owner of the adjoining land cannot prevent its being
"built, and may not be able to disturb the enjoyment of it
"without the most serious loss or inconvenience to himself,
"the law favours the preservation of enjoyments acquired by
"the labour of one man *and acquiesced* in by another who
"has the power to interrupt them."

In *Angus* v. *Dalton*,[2] Thesiger, L.J., referring to *Webb* v. *Bird*[3] and *Chasemore* v. *Richards*[4] as instances of the secrecy of user and incapability of interruption operating against the acquisition of an easement by prescription, said that they were *Angus v. Dalton.*

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affirmative and negative easements, or in taking legal proceedings as regards affirmative easements alone. *See infra*, under "What is effective interruption by servient owner."

[1] (1848) 12 Q. B. at p. 749; 20 L. J. Q. B. at p. 14.

[2] (1878) 4 Q. B. D. at p. 175. *See* also *per* Cotton, L.J., at p. 187, "Enjoyment does not confer a right unless the enjoyment has been open."

[3] (1863) 13 C. B. N. S., 841.

[4] (1859) 7 H. L. C., 349.

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direct authorities to shew that "a physical incapacity of being "obstructed as regards the easement itself, or an uncertainty "and secrecy of enjoyment putting it out of the category of "all ordinary known easements, will prevent the presump- "tion of an easement by lost grant; and, on the other hand, "indirectly, they tend to support the view, that as a general "rule where no such physical incapacity, or peculiarity of "enjoyment, as was shewn in those cases, exists, uninterrupted "and unexplained user will raise the presumption of a grant "upon the principle expressed by the maxim, '*Qui non pro-* "'*hibet quod prohibere potest, assentire videtur.*'" And again in a later part of his judgment he says, "a user which is secret "raises no presumption of acquiescence on the part of the "servient owner, and, as a consequence, no presumption of "right in the dominant."[1]

Sturges v. *Bridgman.*

In *Sturges* v. *Bridgman*[2] the same learned Lord Justice clearly enunciates the law.

After stating that consent or acquiescence on the part of the servient owner lies at the root of prescription, and of the fiction of a lost grant, and that the acts or user which go to the proof of either one or the other must be *nec vi, nec clam, nec precario*, he proceeds, "a man cannot, as a "general rule, be said to consent to or acquiesce in the "acquisition by his neighbour of an easement through an "enjoyment of which he has no knowledge, actual or con- "structive, or which he contests and endeavours to interrupt, "or which he temporarily licenses. It is a mere extension "of the same notion, or rather it is a principle into which by "strict analysis it may be resolved, to hold, that an enjoy- "ment which a man cannot prevent raises no presumption of "consent or acquiescence. Upon this principle it was decided "in *Webb* v. *Bird*[3] that currents of air blowing from a par- "ticular quarter of the compass, and in *Chasemore* v. *Richards*[4]

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[1] (1878) 4 Q. B. D. at p. 181.
[2] (1879) 11 Ch. D. at p. 863.
[3] (1861) 10 C. B. N. S., 268; 13 C. B. N. S., 341.
[4] (1859) 7 H. L. C., 349.

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"that subterranean water percolating through the strata in "no known channels, could not be acquired as an easement "by user[1]; and in *Angus* v. *Dalton*,[2] a case of lateral "support of buildings by adjacent soil, which came on appeal "to this Court, the principle was in no way impugned, "although it was held by the majority of the Court not "to be applicable so as to prevent the acquisition of that "particular easement."

"It is a principle which must be equally appropriate to "the case of affirmative as of negative easements; in other "words, it is equally unreasonable to imply your consent "to your neighbour enjoying something which passes from "your tenement to his, as to his subjecting your tenement "to something which comes from his, when in both cases "you have no power of prevention."

"But the affirmative easement differs from the negative "easement in this, that the latter can under no circumstances "be interrupted except by acts done upon the servient tene- "ment, but the former, constituting, as it does, a direct "interference with the enjoyment by the servient owner of "his tenement, may be the subject of legal proceedings as "well as of physical interruption. To put concrete cases— "the passage of light and air to your neighbour's windows "may be physically interrupted by you, but gives you no "legal grounds of complaint against him. The passage of "water from his land on to yours may be physically inter- "rupted, or may be treated as a trespass and made the "ground of action for damages, or for an injunction, or both."

Again, in *Dalton* v. *Angus*[3] the necessity for the enjoyment which raises the presumption of a grant being open or capable *Dalton* v. *Angus.*

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[1] And it has recently been decided that an easement of a special or extraordinary amount of light is of too indefinite a character to be the subject of a presumed grant by long enjoyment, and even though the servient owner may have had notice that such light was required for his neighbour's business, *Ambler* v. *Gordon* (1905), 1 K. B., 417, following the views expressed in *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179, 202, 203, 207, 208, 209.

[2] (1878) 4 Q. B. D., 162.

[3] (1881) 6 App. Cas. at pp. 757, 766, 774, 785, 786, 801.

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of interruption was declared by all the judges who had occasion to notice the subject. In the same case Fry, J., said[1]—

"There is no sense in binding a man by an enjoyment "he cannot prevent, or quieting a possession which he could "never disturb."

"'*Qui non prohibet quod prohibere potest, assentire videtur :*' "'*contra non valentem agere, nulla currit prescriptio,*' are two "maxims which shew that prescription and assent are only "raised where there is a power of prohibition."

By *clam* is not meant fraudulently or surreptitiously. It is sufficient that the easement has not come to the knowledge of the party disputing it, and is not of such a nature that his attention ought reasonably to have been drawn to it.[2]

As regards the question of capability of interruption both Lindley, J., and Fry, J., in *Dalton* v. *Angus*[3] felt themselves compelled by authority to hold that an easement of support being physically capable of obstruction could be acquired by prescription, but they both doubted the expediency and common-sense of a law which obliges an adjoining owner to remove the soil used for support, which he would otherwise have left where it was, in order to preserve his unrestricted right to do so at some future time, and thereby imposes upon him the necessity of an excavation which might be at once expensive, difficult, and churlish.

Knowledge may be either actual or constructive.

The knowledge which is necessary to affect the servient owner with notice of the right that is being acquired against him so as to make the enjoyment of it capable of interruption by him, may be either actual or constructive.[4]

Angus v. *Dalton*.

As regards constructive knowledge, *Dalton* v. *Angus*[5] is a case in point.

There it was said by Lord Chancellor Selborne that if

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[1] At p. 774.

[2] *Union Lighterage Co.* v. *London Graving Dock Co.* (1901), 2 Ch., 300; affirmed on appeal (1902), 2 Ch., 557.

[3] (1881) 6 App. Cas. at pp. 764, 775.

[4] *Sturges* v. *Bridgman* (1879), 11 Ch. D., 852; *Angus* v. *Dalton* (1878–1881), 3 Q. B. D., 85; 4 Q. B. D., 162; 6 App. Cas., 740; and *see Union Lighterage Co.* v. *London Graving Dock Co.* (1902), 2 Ch. at p. 574.

[5] (1881) 6 App. Cas. at p. 801. And *see Union Lighterage Co.* v. *London Graving Dock Co.*, *ubi sup.*

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a house which formerly enjoyed a right of support is pulled down and a building of an entirely different character is erected in its place, the adjoining owner must have imputed to him knowledge that a new and enlarged easement of support, whatever may be its extent, is going to be acquired against him, unless he interrupts or prevents it. It is not essential to the acquisition of the easement that he should have particular information as to the details of the new structure.

There are some things of which all men ought to be presumed to have knowledge, and amongst them is the fact that, according to the laws of nature, a building cannot stand without vertical, or, ordinarily, without lateral support.

What is effective interruption by servient owner.

Supposing the servient owner to have knowledge of the right which is being acquired against him and the power to interrupt it, the next question is what sort of interruption is necessary in order to prevent the acquisition of the easement.

Angus v. *Dalton*. *Sturges* v. *Bridgman*.

From the observations of the learned judges in *Angus* v. *Dalton*[1] and *Sturges* v. *Bridgman*[2] it appears that effective interruption, in the case of affirmative easements, must consist either in doing some act on the servient tenement or in taking legal proceedings for the direct interference with the servient owner's rights of ownership, and in the case of negative easements, in doing some act on the servient tenement.

Cross v. *Lewis*.

Thus in *Cross* v. *Lewis*[3] Bayley, J., speaking of the case of a man opening windows, says: "If his neighbour objects "to these, he may put up an obstruction, but that is his only "remedy, and if he allows them to remain unobstructed for "twenty years, that is a sufficient presumption of an agreement "not to obstruct them."

Neither proof of circumstances which merely negative

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[1] *See* the judgment of Thesiger, L.J., in 4 Q. B. D. at p. 172; that of Lindley, J., in *Dalton* v. *Angus*, 6 App. Cas. at p. 766; and that of Fry, J., at p. 774.

[2] *See* the judgment of Thesiger, L.J., in 11 Ch. D. at p. 864.

[3] (1824) 2 B. & C., 686 (689). *See* also judgment of Littledale, J., in *Moore* v. *Rawson* (1824), 3 B. & C., 339.

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actual assent on the part of the servient owner to the enjoyment of the easement claimed nor evidence of dissent, such as a protest on the part of servient owner unaccompanied by actual interruption of, or obstruction to, the enjoyment, is effectual to support a plea of interruption.[1]

Enjoyment must be as of right.

Thirdly, *the enjoyment must be as of right*.[2]

The person claiming the easement must shew that he has exercised it as if he had been the true owner, without permission or license from any one.

Thus, it has been held that enjoyment for part of the twenty years had under license, or permission, from the servient owner is not enjoyment for that period so as to be evidence of a perfect right.

Winship v. *Studspeth*.

This was the case of *Winship* v. *Studspeth*,[3] where the defendant who claimed a right of way was found to have exercised the way for the first seven years by the permission of the then owner and for the remaining fourteen years prior to action as an easement. Alderson, B., said that the way must be exercised for the period prescribed *as of right against all persons* so as to be evidence of a perfect right, and that on the evidence the defendant had no way "*as of right*" since the exercise for the first seven years was during a period when the owner could not stop him.

Sturges v. *Bridgman*.

As a general rule, says Thesiger, L.J., in *Sturges* v. *Bridgman*,[4] a man cannot be said to consent to, or acquiesce

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[1] *Angus* v. *Dalton* (1878), 4 Q. B. D. at p. 172; *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 766.

[2] *I.e. nec precario*. "What is precarious? That which depends, not on "right, but on the will of another person. "As Bracton, 221 *a*, puts it: 'Si autem "'precario fuerit et de gratiâ, quae "'tempestive revocari possit et intem-"'pestive, ex longo tempore non acquisi-"'tur jus.' That is to say, if the servient "owner can tempestive aut intempestive "—whether the dominant owner likes it "or not—put a stop to the easement, "there is really no easement, because the "very idea of right which necessarily "underlies an easement is negatived." *Per* Farwell, J., in *Burrows* v. *Lang* (1901), 2 Ch. at pp. 510, 511.

[3] (1854) 10 Exch., 5.

[4] (1879) 11 Ch. D. at p. 863. *See* also *Monmouth Canal Co.* v. *Harford* (1834), 1 C. M. & R., 614; *Onley* v. *Gardiner* (1838), 4 M. & W. at p. 500; *Tone* v. *Preston* (1883), 24 Ch. D., 739; *Chamber Colliery Co.* v. *Hopwood* (1886), 32 Ch. D., 549.

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in, the acquisition of an easement through an enjoyment which he temporarily licenses.

And upon the same principle it has been decided that payment for leave to use a way,[1] and an agreement for access of light to a window, preclude the user from being as of right.[2]

Another instance of precarious enjoyment is that furnished by the case of *Arkwright* v. *Gell*,[3] which decides that the enjoyment of a temporary artificial stream is of too precarious a nature to establish a prescriptive right to the flow of water in such a stream as against the originator.[4] *Arkwright* v. *Gell.*

In connection with the present topic may be noticed the rule that the right claimed should be enjoyed as an *easement* during the prescriptive period. If the nature of the user is such as to preclude the possibility of the right claimed having been enjoyed as an easement for any part of the necessary period of enjoyment, no easement is acquired. Thus, unity of possession or ownership during any part of the prescribed period operates as a disqualification and excludes the period during which it has continued.[5]

Effect of unity of possession on acquisition of the right.

At one time, it appears to have been considered that the effect of the unity was not only to suspend during its continuance the accruing right to the easement, but also to nullify any valid enjoyment which had preceded it,[6] but later decisions appear to justify the conclusion that the interruption caused by the unity is not an adverse interruption under the statute, but a mere suspension of the growing right, so that if it could be shewn that the enjoyment had lasted say for fifteen years, and then there had been an interruption by unity of

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[1] *Gardner* v. *Hodgson's Kingston Brewery Co.* (1903), App. Cas., 229.

[2] *Easton* v. *Isted* (1903), 1 Ch., 405.

[3] (1839) 5 M. & W., 203.

[4] *See* also *Burrows* v. *Lang* (1901), 2 Ch., 502.

[5] *Onley* v. *Gardiner* (1838), 4 M. & W., 496; *Clayton* v. *Corby* (1842), 2 Q. B., 813; *Harbidge* v. *Warwick* (1849), 3 Exch., 552; *Battishill* v. *Reed* (1856), 18 C. B., 696; *Ladyman* v. *Grave* (1871), L. R., 6 Ch. App., 763; *Ecclesiastical Commissioners* v. *Kino* (1880), 14 Ch. D., 213; *Damper* v. *Bassett* (1901), 2 Ch. 350.

[6] *Onley* v. *Gardiner* (1838), 4 M. & W., 496; *Battishill* v. *Reed* (1856), 18 C. B., 696.

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possession, and then, the unity of possession having terminated, the enjoyment had lasted for five years more, in such a case an enjoyment for twenty years could have been pleaded.[1]

In addition to the requisites contained in the phrase *nec vi*, *nec clam*, *nec precario*, it is further essential to the acquisition of an easement that the enjoyment should be definite in character, and that the right should be physically capable of interruption.

Enjoyment should be definite in character.

That the enjoyment should be definite in character follows from the rule that the enjoyment should be capable of interruption. An enjoyment which is casual and uncertain in character puts the right claimed through it out of the category of all ordinary known easements.

Easement should be physically capable of interruption.

Further, physical incapacity of obstruction as regards the easement itself will defeat the acquisition of the prescriptive right.

Webb v. *Bird*. *Chasemore* v. *Richards*.

For both these propositions the cases of *Webb* v. *Bird*[2] and *Chasemore* v. *Richards*,[3] are recognised authorities, and are referred to in that connection by Thesiger, L.J., in *Angus* v. *Dalton*[4] and *Sturges* v. *Bridgman*.[5]

Question as to continuity of enjoyment.

Connected with the law of prescription under the statute is the important question of continuity of enjoyment.

For this purpose it is necessary to differentiate the cessation of enjoyment which is caused by some act of interruption or obstruction on the part of the adjoining owner, or some person other than the person claiming the right, from the cessation of enjoyment which arises from mere non-user on the part of the person claiming the right.

Cessation of enjoyment through "interruption."

First, as regards cessation of enjoyment by interruption, it has been held that the term "interruption" has the same meaning in sections 2, 3, and 4 of the Prescription Act, and

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[1] *Ladyman* v. *Grave* (1871), L. R., 6 Ch. App., 763; *Hollins* v. *Verney* (1884), 13 Q. B. D., 304.

[2] (1863) 13 C. B. N. S., 841.

[3] (1859) 7 H. L. C., 349.

[4] (1878) 4 Q. B. D., pp. 174, 175.

[5] (1879) 11 Ch. D. at p. 836. And *see* *Hollins* v. *Verney* (1884), 13 Q. B. D. at pp. 308, 309.

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refers to an adverse obstruction and not a mere discontinuance of user,[1] and in reference to section 4 of the same Act it has been held that an interruption by the adjoining owner submitted to, or acquiesced in, for a year, is fatal to the acquisition of the easement at whatever part of the prescribed period such interruption may occur, but that an interruption for less than a year, though acquiesced in, is not fatal whether it occurs at the commencement, or end, or at any part of the statutory period.[2]

Flight v. *Thomas*.

In *Flight* v. *Thomas*, the easement in contest was a continuous easement, a right to light, and the plaintiff had enjoyed the light for nineteen years and three hundred and thirty days when the defendant raised a wall which obstructed the light. The obstruction was submitted to for thirty-five days only, when the plaintiff brought an action for it. It was decided that the enjoyment for nineteen years and three-quarters was sufficient to establish a right to light under the statute and could be accepted as "actual enjoyment" for the period required by the statute.

Court will not protect inchoate right by injunction.

But though an inchoate right is not defeated by an interruption not acquiesced in for less than a year, the Court will not interfere to protect it by injunction before it is complete.[3]

Stranger may interrupt.

The interruption or obstruction may be caused by the act of a stranger as well as by the owner of the servient tenement.[4]

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[1] *Flight* v. *Thomas* (1840), 8 Cl. & Fin., 231; *Carr* v. *Foster* (1842), 3 Q. B. D., 581; *Hollins* v. *Verney* (1884), 13 Q. B. D., 304, 307; *Cooper* v. *Straker* (1888), 40 Ch. D., 21, 27; *Smith* v. *Baxter* (1900), 2 Ch., 138, 143. *See* the Prescription Act set out in App. I. The term "interruption" is used in the same sense in the Indian Enactments, *see* Indian Limitation Act, s. 26, and Explanation, App. IV; I. E. Act, s. 15, and Explanation II, App. VII, and *Sham Churn Auddy* v. *Tariney Churn Banerjee* (1876), I. L. R., 1 Cal., 422 (430).

[2] *Flight* v. *Thomas*, *ubi sup*. And *see* *Eaton* v. *Swansea Waterworks Co.* (1851), 17 Q. B., 267; *Hollins* v. *Verney* (1884), 13 Q. B. D., 304, 307, 314; *Cooper* v. *Straker* (1888), 40 Ch. D., 21 (27); *Tilbury* v. *Silva* (1890), 45 Ch. D., 98.

[3] *Bridewell Hospital Governors* v. *Ward, Lock, Bowden & Co.* (1893), 62 L. J. Ch., 270; *Lord Battersea* v. *Commissioners of Sewers for City of London* (1895), 2 Ch. D., 708. There is no such thing known to the law as an inchoate easement, *Greenhalgh* v. *Brindley* (1901), 2 Ch., 324.

[4] *Davies* v. *Williams* (1851), 16 Q. B., 546; 20 L. J. Q. B., 330.

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By section 7 of the Prescription Act life estates held by persons otherwise capable of resisting the claim are excluded in the computation of the prescribed periods of enjoyment.

In other words, a tenant for life cannot by acquiescence burthen the estate.

Tenant for life may interrupt.

But though a tenant for life cannot acquiesce he may by interruption free the estate, so as to defeat an inchoate right. Thus, under the English law, if there is an enjoyment for an incomplete period before the life estate and there is an interruption acquiesced in for more than a year during the life estate, such interruption will be sufficient to defeat the right.[1]

An interruption which is fatal to the acquisition of an easement will not prevent a subordinate or qualified easement being acquired where the subject-matter admits of it.

Thus, where an interruption, acquiesced in, of the flow of water in a weir by a fender put down for the better working of a mill was considered to be fatal to the acquisition of a right to the weir as an easement, it was held that, as such interruption had not the effect of withdrawing all the water from the weir, there was nothing to prevent a qualified easement being acquired by an uninterrupted user of the weir for the purpose of taking fish at such time as the fender was down, and the whole body of the water was not required for the use of the mill.[2]

The question whether or not there has been submission to, or acquiescence in, the interruption necessary to defeat the acquisition of the easement is a question of fact and depends upon the circumstances of the case and the conduct of the parties.[3]

But in order to negative submission to, or acquiescence in, the interruption, it is not necessary that the party interrupted shall have brought an action or suit, or taken any active steps

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[1] *Clayton* v. *Corby* (1842), 2 Q. B., 813.

[2] *Rolle* v. *White* (1868), L. R., 3 Q. B. at p. 302. And *see Goodman* v. *Mayor of Saltash* (1882), 7 App. Cas., 633.

[3] *Bennison* v. *Cartwright* (1864), 5 B. & S., 1; *Glover* v. *Coleman* (1874), L. R., 10 C. P., 108.

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to remove the obstruction; it is enough to shew that he has in a reasonable manner made it known to the party causing the interruption that he does not really submit to, or acquiesce in, it.[1]

The fact that certain members of a particular body of persons have acquiesced in an interruption will not bar the rights of the others who, as a body, have never submitted to, or acquiesced in, the interruption.[2]

So much as regards cessation of enjoyment through interruption.

Then as regards cessation of enjoyment through non-user on the part of the person claiming the right.

Cessation of enjoyment through non-user.

In this connection it is self-evident that discontinuous easements such as easements of way, easements to take water, and easements to discharge water by artificial means on to another's land which need the act of man for their enjoyment are more apt to furnish instances of non-user than easements which are continuous, such as easements of light, though even in their case the interruption of enjoyment may arise from some act on the part of the owner of the dominant tenement which renders the enjoyment of the easement temporarily impossible, in which event they have been held to be governed by the same rule as discontinuous easements.[3]

Inasmuch as the Prescription Act[4] differs from the Indian enactments[5] in requiring *actual* enjoyment for twenty years without interruption, and the English decisions necessarily turn in part on such different wording of the statute, it would seem to be beyond the scope of this work to do more than state in general terms such conclusions of English law as would appear to be relevant to similar questions of non-user arising under the Indian enactments upon a common wording.

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[1] *Ibid.*

[2] *Warrick* v. *Queen's College, Oxford* (1870), L. R., 10 Eq., 105.

[3] *See Smith* v. *Baxter* (1900), 2 Ch., 138 and *infra*.

[4] *See* sections 2 and 3, App. I.

[5] *See* Indian Limitation Act, XV of 1877, s. 26, App. IV; I. E. Act, s. 15, App. VII.

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(1) In reference to discontinuous easements.

First, in reference to discontinuous easements, the following conclusions would appear to be equally applicable in England and India :—

(1) That the words "without interruption" do not mean "without cessation" of user on the part of the person claiming the right, as it would be contrary to common-sense to suppose that the Legislature intended there should be a continuous user by day and night for twenty years without any cessation whatever.[1]

(2) That it is a sufficient compliance with the statutory requirements that the user has been of such a character and has occurred at such intervals as in the circumstances of the particular case to afford a reasonable indication to the owner of the servient tenement that a right to future enjoyment is being asserted against him and ought to be resisted if it is not recognised, and if resistance to it is intended.[2]

(3) That whilst a cessation of user which in the particular circumstances would exclude an inference of an enjoyment of the necessary character for the full statutory period would be fatal at whatever portion of such period the cessation occurred,[3] a cessation of user not excluding such inference would not be fatal whether it occurred at the beginning,[4] middle,[5] or end,[6] of such period.[7]

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[1] *Hollins* v. *Verney* (1884), 13 Q. B. D., 304, 307, 308. These words "without interruption" are intended to denote an adverse obstruction, *see supra* under "Cessation of enjoyment through 'interruption'" and the cases there cited.

[2] *Hollins* v. *Verney*, *ubi sup.* at p. 315; Gale on Easements, 8th Ed., p. 186.

[3] *Hollins* v. *Verney* (1884), *ubi sup.* at p. 304.

[4] *Lawson* v. *Langley* (1836), 4 A. & E., 890; *Hall* v. *Swift* (1838), 6 Scott., 167; 4 Bing. N. C., 381; *Hollins* v. *Verney*, *ubi sup.*

[5] *Carr* v. *Foster* (1842), 3 Q. B. 581; *Hollins* v. *Verney*, *ubi sup.*

[6] *Parker* v. *Mitchell* (1810), 11 A. & E., 788; *Lowe* v. *Carpenter* (1851), 6 Exch., 825; *Hollins* v. *Verney*, *ubi sup.* But there is this difference when the non-user occurs at the end of the period, that there can be no subsequent user to explain it, and the inference of enjoyment for the full period next before action is more difficult to draw than in the other cases, *Hollins* v. *Verney*, *ubi sup.* at p. 314.

[7] Similarly, in India, non-user is not a bar to the acquisition of the easement, if, in the special circumstances of the case, it be capable of explanation consistently with continued enjoyment as of right, *see Ram Soondar Barooie* v. *Wooma Kant Chuckerbutty* (1864), 1 W. R., 217; *Oomar Shah* v. *Ramzan Ali* (1868), 10

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(2) In reference to continuous easements.

Secondly, similar conclusions would appear to be applicable to the case of a continuous easement, such as an easement of light,[1] and in reference thereto, the word "enjoyed," as occurring in section 3 of the Prescription Act,[2] has been taken to mean not "having continuously used," but "having had the amenity or advantage of using" the access of light, the intention being that the owner of a house may acquire the right to have the access of light over adjoining land to an opening which he has used in such manner as suited his convenience for the passage of light during twenty years.[3]

Thus, it has been decided that in order to acquire an easement of light under the section it is not necessary that the building in respect of which the right is claimed should be occupied or even finished so as to be fit for occupation during the specified period,[4] and that the occasional or periodical closing of shutters does not prevent the acquisition of a right to a light through the apertures.[5]

So, too, the growing right is not lost by a cessation of enjoyment caused by a mere pulling down and rebuilding.[6]

But when the cessation of enjoyment has been caused by the alteration or rebuilding of the house in respect of which the light is being enjoyed, the question whether or not the

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W. R., 363; *Mokoondanath Bhadoory* v. *Shib Chunder Bhadoory* (1874), 22 W. R., 302; *Sheikh Mahomed Ansur* v. *Sheikh Seefatoollah* (1874), 22 W. R., 340; *Sham Churn Auddy* v. *Tariney Churn Banerjee* (1876), I. L. R. 1 Cal., 422 (430); *Budhu Mandal* v. *Maliat Mandal* (1903), I. L. R., 30 Cal., 1077, and *infra*, Part I, C, and Part II.

[1] *See Courtauld* v. *Legh* (1869), L. R., 4 Exch., 126; *Cooper* v. *Straker* (1888), 40 Ch. D., 21; *Collis* v. *Laugher* (1894), 3 Ch., 659; *Smith* v. *Baxter* (1900), 2 Ch., 138 (143); *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (206).

[2] *See* App. I; *cf.* Indian Limitation Act, XV of 1877, s. 26, App. IV; I. E. Act, s. 15, App. VII.

[3] *Cooper* v. *Straker*, *ubi sup.* at p. 27; *Smith* v. *Baxter*, *ubi sup.* at pp. 144, 145.

[4] *Courtauld* v. *Legh*; *Collis* v. *Laugher*, *ubi sup.* To the same effect are the Indian decisions, *see Pranjivandas* v. *Meyeram* (1862), 1 Bom. H. C., 148; *Elliott* v. *Bhoobun Mohun Bonnerjee* (1873), 12 B. L. R., 406; Ind. App. Supp. Vol. 175.

[5] *Cooper* v. *Straker*, *ubi sup*; *Smith* v. *Baxter*, *ubi sup.* at p. 145. And in India the aperture admitting the light may be a door as well as a window, *Bottlewalla* v. *Bottlewalla* (1871), 8 Bom. H. C., O. C. J. at p. 190.

[6] *Smith* v. *Baxter*, *ubi sup.*

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acquisition of the easement is thereby prevented is governed by the same principles as would be applicable to a similar state of facts after an easement of light had been acquired.[1]

No easement acquired where continuity of rightful enjoyment broken by periods of permissive user *Monmouth Canal Co.* v. *Harford.*

But though a cessation of enjoyment may be so explained as not to defeat the acquisition of the growing right, the law is different where the continuity of rightful enjoyment is broken by periods of permissive user. This was the case of the *Monmouth Canal Co.* v. *Harford*,[2] where Parke, B., said: "The issue is, whether the occupiers of the closes, of *right* and "*without interruption*, have had the use and enjoyment for "twenty years, as they insist, under this issue, therefore they "must shew an uninterrupted rightful enjoyment for twenty "years. If they had enjoyed it for one week, and not for the "next, and so on alternately, their plea would not have been "proved. In the case of *Bright* v. *Walker*,[3] lately decided in "this Court, it was held that the claimant must shew that he "has enjoyed the full period of twenty years, and that he has "done so *as of right*, and *without interruption*, and that such "claim might be answered by proof of a license, written or "parol, for a limited period, comprising the whole or part of "the twenty years."

"In the present case, the permission asked for and given "shews that the occupiers of the closes did not enjoy the "way 'as of right,' and also that they do not enjoy it un-"interruptedly."

Prescription Act, s. 4.

With reference to the provision in section 4 of the Prescription Act,[4] that each of the periods prescribed by the statute for the acquisition of easements is to be reckoned as next before the commencement of some suit or action in which the claim shall have been brought into question, it was at one time contended that such enactment must be construed to mean that the periods should be reckoned as next before the act complained of, but it was determined that the statute

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[1] *Smith* v. *Baxter, ubi sup.*; *Andrews* v. *Waite* (1907), 2 Ch., 500.

[2] (1834) 1 C. M. & R., 614 (631).

[3] (1834) 1 C. M. & R., 211; 40 R. R. 536.

[4] *See* App. I.

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must be construed literally and that the enjoyment in order to give a right under the statute must be up to the commencement of the suit or action, and not up to the time of the act complained of.[1]

This conclusion, in supporting the view that the Prescription Act is merely an act of procedure and does not affect the theory that prescription is founded on grant presumed from user, over-rides the opinion, which appears at one time to have been entertained, that in fact and in theory an easement was acquired by the prescribed user, and that a servient owner could sue for any alleged trespass committed before the end of the twenty years user. But it was decided in *Wright* v. *Williams*[2] that this was not so, and that an action by the servient owner for an alleged trespass committed before the twenty years which had expired before the action was brought, would not lie, because the statute was intended to confer after the periods of enjoyment therein mentioned a right from their first commencement, and to legalise every act done in the exercise of the right during their continuance. *Wright* v. *Williams.*

The commencement of the suit or action is the terminus of the periods of enjoyment appointed by the statute for the acquisition of the right, and the effect is that, immediately upon the bringing of such suit or action, the enjoyment if of the required character and length shall ripen into a right. If the statute did not then come into operation, there would be a right without a remedy.

The right is created upon the bringing of the first action in which, by reason of the claim having been brought into question, it becomes necessary for the person claiming such right to possess it for the purpose of his action or defence. Right created upon bringing of the *first* suit or action.

By reason of such enjoyment before any suit being sufficient to establish a right, the claimant, upon the bringing of any such suit or action, may rely upon an enjoyment

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[1] *Wright* v. *Williams* (1836), 1 M. & W., 77; *Richards* v. *Fry* (1838), 7 A. & E., 698; *Ward* v. *Robins* (1846), 15 M. & W., 237.

[2] *Ubi sup.*

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satisfying the statute, ending with either the existing suit or any of the previous suits or actions.

Cooper v. *Hubbuck*.

This was decided in *Cooper* v. *Hubbuck*,[1] where the question was raised as to the meaning of the words in "some suit or "action wherein the claim or matter to which such period may "relate shall have been or shall be brought into question."

The construction put by the Court on these words was that the proof of user required to be shewn under the statute is only necessary in the first suit or action in which the right is contested, and that it is not correct to suppose that in any succeeding action the period must be proved to have been next before that particular action.

The right asserted and established in the first action is not exhausted by those proceedings because it is given as a right inherent in the land, as if it arose by grant, not as by some machinery applicable to the one suit or action, and which cannot go beyond the period of the existence of that suit or action.

In every succeeding action, therefore, the right is proved by the judgment in the first action where the claimant gets recorded evidence of his title which by virtue of the statute is conclusive evidence of the right.

It makes no difference if the first suit or action never goes to trial so long as there was enough in the actual proceedings to apprise the parties that the claim was advanced, so that there might be an opportunity of litigating upon it.[2]

If this is done the claim is "brought into question" under the statute.

Colls v. *Home and Colonial Stores, Ltd.*

This construction of the section has been affirmed by the recent decision of the House of Lords in *Colls* v. *Home and Colonial Stores, Limited*,[3] where it is laid down that until the claim is thus brought into question no absolute or indefeasible right can arise under the Act, however long the enjoyment may have been. Until then there is merely

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[1] (1862) 12 C. B. N. S., 456.
[2] *Ibid.*
[3] (1904) App. Cas., 179.

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an inchoate right which has not ripened into a title under the Act.[1]

By and against whom prescriptive easements can be acquired.

There are certain well-recognised essentials of the law in relation to the persons by and against whom prescriptive easements can be acquired, which may, at this point, be conveniently considered.

Since an easement, properly so-called, cannot exist except as a right legally appurtenant to a dominant tenement and as exercised over a servient tenement, it is obvious that the persons for whose benefit and to whose disadvantage the right and the correlative obligation have respectively come into existence, must possess rights of ownership over the respective tenements.[2]

Further, it is one of the essential notions of a prescriptive right that such separate ownership must be in fee.[3]

Question whether a tenant can acquire prescriptive easements.

Bearing these principles in mind it becomes necessary to consider the position of a tenant in reference to the acquisition of prescriptive easements.

At common law.

At common law a tenant could not by user acquire an easement against his landlord, or another tenant of the same landlord, or as between himself and a tenant of another landlord, because such a result would, in the two former cases, be a violation of the first principles of the relation between landlord and tenant,[4] and also because, in all three cases, the whole theory of prescription at common law was against presuming any grant or covenant by, with, or to, any one except an owner in fee, or because, in other words, a

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[1] *See per* Lord Macnaghten, *Ibid.* at pp. 189, 190, and *Hyman* v. *Van der Bergh* (1908), 1 Ch., 167.

[2] *Wheaton* v. *Maple & Co.* (1893), 3 Ch., 48; *Kilgour* v. *Gaddes* (1904), 2 K. B., 457.

[3] *Ibid.*

[4] *See Gayford* v. *Moffatt* (1868), L. R., 4 Ch. App., 133, and *Ibid.* at p. 135, where Cairns, L.J., says, "the possession of the "tenant of the demised close is the "possession of his landlord; and it "seems to be an utter violation of the "first principles of the relation of land-"lord and tenant to suppose that the "tenant, whose occupation of close A. "was the occupation of his landlord, "could by that occupation acquire an "easement over close B., also belonging "to his landlord." *See* also *Outram* v. *Maude* (1881), 17 Ch. D., 391; *Bayley* v. *G.-W. Ry. Co.* (1884), 26 Ch. D. at p. 441; *Kilgour* v. *Gaddes*, *ubi sup.*

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prescriptive right must be claimed as appendant or appurtenant to land and not annexed to it for a term of years.[1]

Under the Prescription Act.

The same considerations are applicable to easements of all kinds under the Prescription Act,[2] but with this exception, that by virtue of the omission from the statute of the words "as of right" in reference to an easement of light,[3] and of the inapplicability of section 8,[4] a tenant can acquire a prescriptive easement of light, either against his own landlord, or against a tenant under the same or a different landlord,[5] provided in the two latter cases he can establish it against the reversioner, but not otherwise,[6] the reason for such proviso being the well-recognised principle that an easement, if acquired by prescription, whether under the statute or the common law, must be absolute and not for a term of years.[7]

Easement of light.

Against whom tenant can acquire prescriptive easement for benefit of his landlord.

A termor can by user acquire for the benefit of his landlord any kind of easement against another owner in fee in possession.[8] But having regard to the provisions of section 8 of the Prescription Act he could not acquire any of the easements therein mentioned over land in the occupation of a termor under another landlord.[9]

Disability under s. 8 of the Prescription Act.

By virtue of section 8 of the Prescription Act,[10] if the property upon, over, or from which, any way, watercourse, or use of water[11] is enjoyed or derived, is subject to a term

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[1] *Wheaton* v. *Maple & Co.*; *Kilgour* v. *Gaddes*, *ubi sup.*

[2] *Wheaton* v. *Maple & Co.*, *ubi sup.*

[3] *See Wheaton* v. *Maple & Co.*; *Kilgour* v. *Gaddes*, *ubi sup.*

[4] This section only applies to ways, watercourses, and use of water, *see infra* and App. I.

[5] *Frewen* v. *Philipps* (1861), 11 C. B. N. S., 449; *Mitchell* v. *Cantrill* (1887), 37 Ch. D., 56; *Robson* v. *Edwards* (1893), 2 Ch., 146; *Wheaton* v. *Maple & Co.*, *ubi sup.*; *Fear* v. *Morgan* (1906), 2 Ch., 406, affirmed *sub nom. Morgan* v. *Fear* (1907), App. Cas., 425. And *see Kilgour* v. *Gaddes*, *ubi sup.*; *Richardson* v. *Graham* (1908), 1 K. B., 39.

[6] *Wheaton* v. *Maple & Co.*; *Fear* v. *Morgan*, *ubi sup.*

[7] *Wheaton* v. *Maple & Co.*; *Kilgour* v. *Gaddes*, *ubi sup.*

[8] *Kilgour* v. *Gaddes*, *ubi sup.*

[9] *See infra*, and *Bright* v. *Walker* (1834), 1 C. M. & R., 211; 40 R. R., 536; *Wheaton* v. *Maple*, *ubi sup.*; *Kilgour* v. *Gaddes*, *ubi sup.* A contrary view appears to have been expressed in Ireland, *see Beggan* v. *M'Donald* (1878), 2 L. R. Ir., 560.

[10] *See* App. I.

[11] This mode of expression avoids the confusion of terms to be found in s. 27 of the Indian Limitation Act, XV of 1877, and in s. 16 of the Indian Easements Act,

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for life or of years exceeding three years from the granting of the term, the time of such enjoyment is excluded in the computation of the period necessary to gain the easement in case the claim is resisted by the reversioner within three years next after the end or sooner determination of such term.

Extent of the disability.

And this statutory disability to acquire any of the last-mentioned easements as against a reversioner holds good equally as against his tenant, and whether the person claiming the easement is the tenant of the same, or of a different, landlord,[1] and proceeds upon the ground, already mentioned, that a right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years.[2]

Effect of the section.

The effect of the statutory provision is apparently not to unite two disconnected periods of user, namely, the user prior to the excluded period and the user subsequent thereto, but to extend the period of the continuous enjoyment which is necessary to give the right, by so long a time as the land is out on lease, subject to the proviso contained in the section.[3]

Prescription should be reasonable and certain.

Lastly, it is of the essence of prescription in English law, that it should be reasonable in its nature and certain.[4] A prescription which is unreasonable not only ought not to be inferred by a jury, but *cannot* be inferred in point of law.[5]

On this ground a claim of a prescriptive right in the owners of one close to enter another close and to cut down,

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V of 1882, for the *enjoyment* here referred to is obviously not of an *easement*, but is only the *inchoate enjoyment* necessary to the acquisition of the easement. In this view, the use of the word *easement* in the Indian enactments seems hardly accurate.

[1] *Bright* v. *Walker*, *ubi sup.*; *Wheaton* v. *Maple & Co.*, *ubi sup.* A contrary view appears to have been suggested in *Daniel* v. *Anderson* (1862), 31 L. J. Ch., 610, and to have been taken in the Irish cases of *Beggan* v. *M'Donald* (1878), 2 L. R. Ir., 560, and *Fahey* v. *Dwyer* (1879), 4 L. R. Ir., 271. *See* all these cases discussed in *Kilgour* v. *Gaddes*, *ubi sup.*

[2] *See Wheaton* v. *Maple & Co.*, *ubi sup.*; *Kilgour* v. *Gaddes*, *ubi sup.*

[3] *See per* Parke, B., in *Onley* v. *Gardiner* (1838), 4 M. & W., 500.

[4] Comyn's Digest, "Prescription," E, 3 and 4, cited in *Lord Chesterfield* v. *Harris* (1908), 2 Ch. at pp. 410, 412; *Bailey* v. *Stephens* (1862), 12 C. B. N. S. at p. 115.

[5] *Per* Byles, J., in *Bailey* v. *Stephens*, *ubi sup.*

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carry away, and convert to their own use all the trees and wood growing and being thereon was held to be void.[1]

So, too, it has been held that a right to take out of a close so much clay as was at any time required for making bricks at a kiln and at all times of the year could not be claimed by prescription as appurtenant to the kiln, and was unreasonable and bad.[2]

Similarly, a prescriptive right in an indefinite number of people to take à *profit à prendre* without stint and for sale, which must lead to the entire destruction of the property, is altogether unreasonable and cannot be maintained.[3]

Upon the same ground, claims by way of easement to the exclusive enjoyment of another's property have been disallowed.[4]

C.—Prescription in India.

Law in India prior to Act IX of 1871.

Before the Indian Limitation Act IX of 1871 came into force the law of prescription in India was the English law prior to the passing of the English Prescription Act,[5] with this difference, that the rule of immemorial user raising a presumption rebuttable by proof that no grant had in fact been made or by proof of grant made within legal memory, was not recognised.[6]

Proof of uninterrupted enjoyment acquiesced in by the servient owner for a period not exceeding twenty years was considered to raise a presumption of grant sufficiently decisive

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[1] *Bailey* v. *Stephens*, *ubi sup.*

[2] *Clayton* v. *Corby* (1843), 5 Q. B., 415.

[3] *Lord Chesterfield* v. *Harris* (1908), 2 Ch., 397.

[4] *See* the cases cited in note 5 on p. 62, *supra*.

[5] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Bhuban Mohan Banerjee* v. *Elliott* (1870), 6 B. L. R., 85; on appeal to Privy Council (1873), 12 B. L. R., 406; Ind. App. Supp. Vol. 175; *Narotam Bapu* v. *G. Pandurang* (1871), 8 Bom. H. C., O. C. J., 69; *Ponnusawmi Tevar* v. *Collector of Madura* (1868), 5 Mad. H. C., 6. The English Prescription Act was not applicable to India, *Bejoy Prokash Singh* v. *Ameer Ally* (1868), 9 W. R., 91.

[6] *Bagram* v. *Khettranath Karformah*, *ubi sup.*

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for the Court to act upon unless contradicted, or explained, by proof of facts legally inconsistent with the presumption.[1]

Actual belief of prescription, that is, enjoyment during legal memory, or of a grant actually made, was not thought necessary to support the presumption, so that as a jury in England was directed to act upon a presumption arising from user of the necessary character and for the necessary period, so a judge in India under similar circumstances was thought bound to find the existence of the right, unless the presumption was rebutted.[2]

Bagram v. *Khettranath Karformah.*

As was said by Peacock, C.J., in *Bagram* v. *Khettranath Karformah:* "The legal unrebutted presumption of a grant "no more depends upon the actual belief of its existence "than the legal unrebutted presumption of prescription "depends upon the actual belief that the right has been "enjoyed from the time of Richard I."[3]

And in India the presumption of a grant could only be rebutted in the same way as the presumption of a lost grant could be in England.[4]

Thus, it is apparent that although the fiction of a lost grant may have been considered inappropriate in India where there are no juries to be directed,[5] yet exactly the same result was attained in India as in England by the Judge assuming the function of a jury and finding the existence of the right claimed upon the presumption of a grant derived from the necessary enjoyment.[6]

Length of requisite enjoyment.

As regards the period of prescription in India, the Courts, so far as they administered the law of easements in the

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[1] *See* the cases cited in note 5 on last page, and *Mudhoosoodun Dey* v. *Bissonath Dey* (1875), 15 B. L. R, 361; *Rajrup Koer* v. *Abdul Hossein* (1880), I. L. R., 6 Calc., 394; 7 Cal. L. R., 529; 7 I. A., 240.

[2] *Bagram* v. *Khettranath Karformah, ubi sup.*

[3] 3 B. L. R., O. C. J. at p. 49.

[4] *See supra*, B,—Prescription in England.

[5] *Bagram* v. *Khettranath Karformah, ubi sup.* at p. 42.

[6] *See* the judgment of Peacock, C.J., *Ibid.*, pp. 46–56.

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In Presidency towns.

Presidency towns, appear to have followed the English rule of twenty years.[1]

In mofussil.

In the mofussil, however, the law was in an uncertain condition and no fixed period of prescription appears to have been recognised except by Bombay Regulation V of 1827,

Bombay.

applying to the Bombay mofussil, which required thirty years for the acquisition of easements.[2]

Bengal.

In regard to the Bengal mofussil no particular period of prescription was adopted, the Court in some cases inclining to the opinion that by analogy to the Indian Limitation Act XIV of 1859 a user for twelve years would be sufficient,[3] in others considering that the circumstances of a case might be such as to warrant the Court in inferring the existence of a right from a user of four or five, or six years,[4] in others refusing to accept a user for four or five years as sufficient to establish the right,[5] in others thinking that no prescriptive right could be acquired in less than twelve years,[6] in others declaring that a user for less than twelve years was not necessarily fatal and a user for twelve years only not necessarily conclusive,[7] and in others that proof of twenty years' user was not indispensable to the acquisition of an easement, proof of well-established and fixed user being sufficient.[8]

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[1] *Bagram* v. *Khettranath Karformah*; *Bhuban Mohan Banerjee* v. *Elliott*; *Narotam Bapu* v. *G. Pandurang*, *ubi sup.*

[2] *See Anaji Dattshet* v. *Morushet Bapushet* (1865), 2 Bom. H. C., 354; *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C. at p. 20; *Parmeshari Prasad Narain Singh* v. *Mahomed Syud* (1881), I. L. R., 6 Cal. at p. 615. This regulation did not apply to the island and town of Bombay which was subject to the twenty years' rule, *Narotam Bapu* v. *G. Pandurang* (1871), 8 Bom. H. C., O. C. J., 69.

[3] *Joy Prokash Singh* v. *Ameer Ally* (1868), 9 W. R., 91; *Mohim Chunder Chuckerbutty* v. *Chundee Churn Gooroo* (1868), 10 W. R., 452. And *see Doorga Churn Paul* v. *Pearee Mohun* (1868), 9 W. R., 283.

[4] *Krishna Mohan Mookerjee* v. *Jagannath Roy Jogi* (1869), 2 B. L. R., A. C. J., 323.

[5] *Huro Soondaree Debia* v. *Ram Dhun Bhattacharjee* (1867), 7 W. R., 276.

[6] *Kartick Chunder Sircar* v. *Kartick Chunder Dey* (1869), 11 W. R., 522; *Bijoy Keshab Ray* v. *Obhoy Churn Ghose* (1871), 16 W. R., 198; *Krishna Chandra Chuckerbutty* v. *Krishna Chandra Banik* (1869), 3 B. L. R., A. C. J., 211; 12 W. R., 76.

[7] *Rupchandra Ghose* v. *Rupmanjari Dasi* (1869), 3 B. L. R., A. C. J., 325.

[8] *Bhugwan Chunder Chowdhry* v. *Shaikh Khosal* (1867), 7 W. R., 271. But a finding that the exercise of an easement "formerly" is sufficient to establish

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In the Madras Presidency there was the same uncertainty regarding the period of prescription. Madras.

The Courts appear to have followed no fixed rule, but in every case to have reserved to themselves the liberty of determining whether user of the necessary character had been exercised for a sufficient period to justify the finding of the right claimed.[1]

Though the *length* of the prescriptive enjoyment was not governed by any fixed rule, there was a uniformity of decision in the Indian Courts that the *character* of the enjoyment should be in accordance with English principles. Character of enjoyment.

Thus, the English rule of uninterrupted enjoyment, and of enjoyment *nec clam, nec vi, nec precario* has been constantly recognised and applied in India.[2]

Similar recognition was given to the English rule that there can be no enjoyment "as of right" during unity of possession or ownership,[3] or by the license or permission of the servient owner.[4]

Similarly, it has been held in India that user for any number of years will not be sufficient to confer a right of way

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the right is not one that can be supported, as indicating no length of time, *Krishna Chandra Chuckerbutty* v. *Krishna Chandra Kanik* (1869), 3 B. L. R., A. C. J., 211; 12 W. R., 76.

[1] *See Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6; *Subramaniya* v. *Ramchandra* (1872), I. L. R., 1 Mad. at p. 338.

[2] *Bagram Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Elliott* v. *Bhoobun Mohun Bonnerjee* (1873), 12 B. L. R., 406; Ind. App. Supp. Vol. 175; *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6; *Narotam Bapu* v. *G. Pandurang* (1871), 8 Bom. H. C., O. C. J., 69. *See* also *Moonshee Zameer Ali* v. *Muzamut Doorgabux* (1864), 1 W. R., 230; *Gooroo Pershad Roy* v. *Bykunto Chunder Roy* (1866), 6 W. R., 82; *Mallik Jawad-ul-huq* v. *Ram Prasad Das* (1869), 3 B. L. R., A. C. J., 281; *Asker* v. *Ram Manick Ray* (1870), 5 B. L. R., A. C. J., 12; 13 W. R., 344; *Chunder Jaleah* v. *Ram Churn Mookerjee* (1871), 15 W. R., 212; *Joy Doorga Dossia* v. *Juggernath Roy* (1871), 15 W. R., 295; *Heera Lall Kooer* v. *Rumesser Kooer* (1871), 15 W. R., 401; *Secretary of State for India* v. *Mathurabai* (1889), I. L. R., 14 Bom., 213.

[3] *Obhoy Churn Dutt* v. *Nobin Chunder Dutt* (1868), 10 W. R., 298.

[4] *Moonshee Zameer Ali* v. *Muzamut Doorgabux* (1864), 1 W. R., 230; *Ashootosh Chuckerbutty* v. *Teetoo Holdar* (1864), Jan. to July, W. R., 293; *Asker* v. *Ram Manick Roy* (1870), 13 W. R., 344; *Ankhoy Coomar Chuckerbutty* v. *Mollah Nobee Nowaz* (1870), 13 W. R., 449; *Heera Lall Kooer* v. *Purmesur Kooer* (1871), 15 W. R., 401.

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if the user is periodically interrupted by the owner resuming, as occasion requires, the exclusive use of his land, and that the only inference to be drawn from such user is that it is permissive.[1]

So, too, the English rule that mere non-user for any particular period, at any particular time, during the prescribed period of acquisition is not necessarily fatal if the non-user be capable of explanation consistently with continued enjoyment as of right has been applied in India, both prior to,[2] and under, the Indian Limitation Acts.[3]

Easement must be preventible.

Acquiescence of servient owner.

So, too, under the general law of prescription in India, easements the enjoyment of which cannot be prevented, cannot be acquired,[4] and the acquiescence of servient owner is an essential element[5] causing the presumption arising from enjoyment to be rebuttable by proof that the owner of the servient tenement was incapable of acquiescing in the easement, as, for instance, that he was an infant, or that he had only a limited interest.[6]

And since acquiescence depends upon a knowledge of the growing right and a failure to resist it, it follows that if there is no knowledge, actual or constructive, one of the essentials of a requisite enjoyment is wanting.

Accordingly, in any particular case outside the Indian Limitation Act, the question may arise as to whether there has been actual or constructive knowledge on the part of the

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[1] *Aukhoy Coomar Chuckerbutty* v. *Mollah Nobee Nowaz, ubi sup.*

[2] *Ramsoonder Burral* v. *Woomakant Chuckerbutty* (1864), 1 W. R., 217; *Oomar Shah* v. *Rumzan Ali* (1868), 10 W. R., 363.

[3] *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory* (1874), 22 W. R., 302; *Sheikh Mahomed Ansur* v. *Sheik Sefatullah* (1874), 22 W. R., 340; *Sham Churn Auddy* v. *Tariney Churn Banerjee* (1876), I. L. R., 1 Cal., 422 (430); *Koylash Chunder Ghose* v. *Sonatun Chang Baroie* (1881), I. L. R., 7 Cal., 132; 8 Cal. L. R., 281; *Budhu Mandal* v. *Maliat Mandal* (1903), I. L. R., 30 Cal., 1077.

[4] *Bhuban Mohan Banerjee* v. *Elliott* (1870), 6 B. L. R. at p. 98; *Budhu Mandal* v. *Maliat Mandal* (1903), I. L. R., 30 Cal. at p. 1082.

[5] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Bhuban Mohan Banerjee* v. *Elliott, ubi sup.*; S. C. on appeal to Privy Council, 12 B. L. R., 406; Ind. App. Supp. Vol. 175; *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6.

[6] *Bagram* v. *Khettranath Karformah, ubi sup.* at p. 53.

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servient owner from which, by his failure to interrupt, acquiescence can be presumed.[1]

In *Bhuban Mohan Banerjee* v. *Elliott*,[2] a distinction, as bearing on this question, was drawn by Chief Justice Couch between the two cases of the servient owner being in possession, and out of possession, of the servient tenement during the period of acquisition. *Bhuban Mohan Banerjee* v. *Elliott.*

That was a case in which the plaintiffs sued to enforce the removal of an obstruction to their alleged rights to light and air, and one of the matters for determination was whether the owner of the servient tenement could be said to have had knowledge of the plaintiffs' enjoyment so as to have acquiesced in the acquisition of the easements.

It was proved in evidence that the servient tenement had for some years during the alleged prescriptive period belonged to one Rajah Ramchand from whom the defendants subsequently purchased, that whilst the Rajah was owner he had never been in possession and that the property had been let out to tenants from whom rent was collected periodically by the Rajah's gomasta.

In reviewing the authorities, the Chief Justice, while agreeing that if the servient owner is in possession of the servient tenement during the prescriptive period he must be taken to have knowledge of the growing right, and that his knowledge is proof of acquiescence if he fails to interrupt, considered the law to be otherwise if the servient owner was out of possession.

In that case he thought that if there was no direct evidence of his knowledge of the enjoyment, it became a question for determination whether from the circumstances of the case and the nature of the easement enjoyed, knowledge might fairly be presumed.

Applying this view of the law to the proved facts, the

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[1] It seems that under the Indian Limitation Act XV of 1877 the knowledge of the servient owner is not essential to the acquisition of an easement, *see Arzan* v. *Rakhal Chunder Roy Chowdhry* (1883), I. L. R., 10 Cal., 214, and *infra*, Part II.

[2] (1870) 6 B. L. R., 85.

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Chief Justice, Markby, J., concurring, came to the conclusion that the evidence was insufficient to raise an implication of knowledge on the part of the owner, and deciding the question of acquiescence in favour of the defendants on this ground, dismissed the plaintiffs' suit.

On appeal to the Privy Council this judgment was affirmed, but on a different ground.[1]

Constructive knowledge.

Their Lordships of the Privy Council, however, said that if it had been necessary to decide the case on the question of acquiescence, they would have desired to hear further argument, as they were by no means satisfied that knowledge on the part of the agent, who acted for the Rajah, collected his rents, and was entrusted with the authority of fixing their amount, would not be constructive knowledge on the part of the Rajah, sufficient to satisfy the exigence of proof on the part of the plaintiffs.[2]

Question whether knowledge of servient owner necessary for whole prescriptive period.

Before leaving the subject of acquiescence there remains to be considered the further question whether when there has been an enjoyment for twenty years, and knowledge by the owner of the servient tenement for only a part of that time, a grant ought to be presumed.

Bhuban Mohan Banerjee v. *Elliott*.

This does not appear to have been ever expressly decided. In *Bhuban Mohan Banerjee* v. *Elliott*,[3] Couch, C.J., took the view that, as twenty years' enjoyment with acquiescence is necessary, there must be knowledge for the whole of that period, and, at any rate, if the knowledge were for a lesser period, it would be a question for the jury whether there was a grant, and not a presumption which they ought to make.[4]

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[1] *Elliott* v. *Bhoobun Mohun Bonnerjee* (1873), 12 B. L. R., 406; Ind. App. Supp. Vol. 175.

[2] 12 B. L. R. at p. 409; Ind. App. Supp. Vol. at p. 179.

[3] (1870) 6 B. L. R. at p. 98.

[4] A dictum of Parke, B., in *Bright* v. *Walker* (1834), 1 C. M. & R. at p. 219; 40 R. R. at p. 544, that one of the ways in which the claim to a right of way may be defeated is by proof of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised, seems to be opposed to this view, but Couch, C.J., thought that some words had been omitted in the report, and that the particular passage should have run "during the whole or part of the time it was exercised."

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If the acquiescence of the servient owner for twenty years is necessary, it would certainly appear to follow that proof of want of knowledge on his part for any portion of that period would be fatal to the prescriptive right.

Effect of obstruction begun before, but not completed until after, expiration of twenty years.

It was decided prior to the Indian Limitation Acts that, where a month before the expiration of twenty years, the servient owner had given notice of his intention to interfere with the enjoyment and raise an obstruction and in pursuance of such notice commenced the erection of a building which did not actually amount to an obstruction until after the expiration of such period, enjoyment with the acquiescence of the servient owner for twenty years could not be presumed and no easement had been acquired.[1]

Part II.—Under the Indian Limitation Acts.

Legislation in India prior to 1871.

Prior to the year 1871 the only enactment in India relating to the acquisition of easements by long enjoyment is to be found in Bombay Regulation V of 1827 which, as already observed, applied to the Bombay mofussil only, and prescribed thirty years as the necessary period of enjoyment.

Bombay Regulation V of 1827.

It was not until 1871 that any Act of general application was passed.

Indian Limitation Act IX of 1871.

This was the Indian Limitation Act IX of 1871.[2] It extended to the whole of British India and received the assent of the Governor-General on the 24th of March, 1871.

It repealed Bombay Regulation V of 1827.

Repealed by Indian Limitation Act XV of 1877.

It continued in force until the 19th of July, 1877, when it was repealed by the Indian Limitation Act XV of 1877.

In relation to easements Act XV of 1877 now applies to such parts of British India as do not fall within the scope of

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[1] *Elliott* v. *Bhoobun Mohun Bonnerjee* (1873), 12 B. L. R., 406; Ind. App. Supp. Vol. 175. But *query* whether this would be sufficient to prevent the acquisition of the easement under the present statutory law, under which the interruption to be fatal must have been submitted to for one year after notice, and the knowledge of the servient owner is immaterial, *see infra*, Part II.

[2] For its provisions, *see* Chap. I, Part II, E, and App. III.

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the Indian Easements Act V of 1882, namely, to Bengal, the Punjab, and Upper and Lower Burma.[1]

Provisions of Act XV of 1877 relating to easements.

The provisions of the Act directly relating to easements are to be found in section 3, sections 26 and 27, and articles 36, 37, and 38 of the second schedule.

There being no express provision in the Act for the limitation of suits for temporary, perpetual, or mandatory injunctions under the provisions of the Specific Relief Act, I of 1877,[2] and the Indian Easements Act,[3] V of 1882, to restrain the disturbance of easements acquired otherwise than by long enjoyment under section 26, article 120 has been held to be applicable to such suits.[4]

Section 3.

Section 3 has already been considered in connection with the fusion of *profits à prendre* in easements,[5] and in this respect it is here sufficient to observe that by the definition of easement therein contained, the Legislature has given a wider meaning to the term easements than that which is to be found in English law.[6]

Arts. 36, 37, and 38.

Articles 36, 37, and 38 are dealt with elsewhere on the question of limitation.[7]

The provisions of the Act which remain to be discussed here are those contained in sections 26 and 27.

Section 26.

Section 26 provides as follows:—

"Where the access and use of light or air to or for any "building have been peaceably enjoyed therewith, as an ease-"ment, and as of right,[8] without interruption, and for twenty "years, and where any way or watercourse, or the use of

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[1] *See* Chap. I, Part III.

[2] Ss. 52–57, both inclusive. *See* Chap. XI, Part III (4), and App. V.

[3] S. 35. *See* Chap. XI, Part III (4), and App. VII.

[4] *See* Chap. XI, Part III (5), and App. IV, and *Kanakasabai* v. *Muttu* (1890), I. L. R., 13 Mad., 445.

[5] *See* Chap. I, Part I.

[6] *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 Cal. L. R., 269; *Dukhi Mullah* v. *Halway* (1895), I. L. R., 23 Cal., 55.

[7] *See* Chap. I, Part II, E; Chap. XI, Part III (5), and App. IV.

[8] *Cf.* s. 15 of the I. E. Act, V of 1882, from which the words "as of right" are omitted, and *see supra*, Part I, B, for a similar omission from the English Prescription Act and for the effect of such omission as regards the acquisition of an easement of light by a tenant, and *see* further *infra*.

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"any water, or any other easement (whether affirmative or "negative) has been peaceably and openly enjoyed by any "person claiming title thereto as an easement, and as of right, "without interruption, and for twenty years, the right to such "access and use of light or air, way, watercourse, use of "water, or other easement shall be absolute and indefeasible."

"Each of the said periods of twenty years shall be taken to "be a period ending within two years next before the institu- "tion of the suit wherein the claim to which such period "relates is contested."

"*Explanation.*—Nothing is an interruption within the "meaning of this section, unless where there is an actual dis- "continuance of the possession or enjoyment by reason of an "obstruction by the act of some person other than the claimant,[1] "and unless such obstruction is submitted to or acquiesced in "for one year after the claimant has notice thereof and of the "person making or authorising the same to be made."

Section 26 corresponds with section 27 of Act IX of 1871, and is in the same terms.

Corresponds with section 27 of Act IX of 1871.

The draughtsmen of Act IX of 1871 appear to have had the English Prescription Act before their eyes,[2] but they have only partially reproduced its provisions in a section which in some important respects is a materially altered version of the English statute.

Relation of Indian Limitation Acts to the English Prescription Act.

From the first paragraph of section 26 of Act XV of 1877 and of the corresponding provision in Act IX of 1871 it will be observed that, unlike the English Act, which does not apply to air,[3] the Indian Limitation Acts place light and air on the same footing.[4] This result is no doubt attributable to the evident desire of the Indian Legislature to favour the acquisition of the right to air at least as much as the acquisition of the right

Act XV of 1877, unlike Prescription Act, places light and air on same footing.

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[1] This corresponds with the English rule, *see supra*, Part I, B, under "What is effective interruption by servient owner" and "Cessation of enjoyment through interruption."

[2] *See Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad. at p. 337.

[3] *See* Gale on Easements, 8th Ed., 341.

[4] *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839.

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to light. The same intention is to be found in the corresponding and other sections of the Indian Easements Act.[1]

Delhi and London Bank v. *Hem Lall Dutt.*

In the case of the *Delhi and London Bank* v. *Hem Lall Dutt*,[2] it was contended in argument for the plaintiff that the effect of the words "absolute and indefeasible" taken with the preceding language of the section was to enlarge the extent and operation of easements of light and air so as to entitle the owner to relief on proof of any interference with the exact amount of light and air enjoyed by him during the prescriptive period, but it was held, in accordance with a similar decision under the English Prescription Act,[3] that such was not the effect of the section, the object of the Indian Limitation Act, like that of the English Act, being not to alter the pre-existing law in that respect, but merely to provide another and more convenient mode of acquiring such easements.[4]

Character and length of enjoyment required by the Act.

Section 26 reproduces the English rule of twenty years' uninterrupted enjoyment *nec vi*, *nec clam*, *nec precario*.[5]

Hence, enjoyment "as of right" is as necessary under the section as under the general law of prescription.[6]

Thus, it has been decided in Bombay that, though a right of free pasturage has always been recognised by Government as belonging to certain villages and must be taken to have been acquired by custom or prescription, such right does not necessarily confer a right of pasturage on any particular piece of land (although it may confer the right of having sufficient land set apart for the purposes of the village), and in the

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[1] *See* ss. 15 and 28, App. VII, and Chap. III, Part I.

[2] (1887) I. L. R., 14 Cal., 839.

[3] *Kelk* v. *Pearson* (1871), L. R., 6 Ch. App., 809; *see* also *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179.

[4] As to the extent and operation in this respect of easements of light and air, *see* Chap. III, Part I.

[5] *See Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335; *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 Cal., L. R., 269; *Lutchmeeput Singh* v. *Sadaulla Nushyo* (1882), I. L. R., 9 Cal., 698; *Secretary of State for India* v. *Mathurabhai* (1889), I. L. R., 14 Bom., 210; *Chunilal* v. *Mangaldas* (1891), I. L. R., 16 Bom., 592. An enjoyment which is incapable of prevention is a bar to the acquisition of an easement, *Budhu Mandal* v. *Maliat Mandal* (1903), I. L. R., 30 Cal., 1077 (1082).

[6] *Ibid.*

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absence of special circumstances, user by the villagers is referable to the general right and cannot be treated as user "as of right" in relation to a claim to a particular right of pasturage.[1]

The view has recently been expressed that, in India, the question whether the enjoyment for the necessary period has been "as of right" must depend not only on the circumstances of each particular case, but also on the habits of the Indian people. Thus, circumstances from which in England a proper and legitimate user might be inferred might not rightly found a similar presumption in India.[2]

It is essential to enjoyment "as of right" and "as an easement" that there should be an adverse exercise of the growing right against the servient owner; thus, there can be no such enjoyment during unity of possession.[3]

If a particular right is claimed, not as an easement, but by virtue of ownership of the land itself supported by evidence of immemorial user, and the suit fails, such evidence will not in a second suit be sufficient to prove an enjoyment "as of right" and "as an easement" as distinguished from a right of ownership. *Evidence adduced to prove enjoyment as owner cannot be relied on to prove enjoyment "as of an easement."*[4]

Meaning of the words "as of right" in reference to particular easements.

The true meaning of the words "as of right" in section 27 of Act IX of 1871 and in section 26 of Act XV of 1877 has, in the case of an affirmative easement such as a right of way, been held to be, not "user without trespass," but "user as the assertion of a right."[5] If they were intended to mean "user without trespass" it is difficult to see how affirmative easements could be acquired, because the enjoyment of a growing affirmative easement consists in reality of repeated acts of trespass on the land of an adjoining owner.

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[1] *Secretary of State for India* v. *Mathurabai*, *ubi sup.*

[2] *Khoda Bux* v. *Shaikh Tazaddin* (1904), 8 Cal. W. N., 359.

[3] *Modhoosoodun Dey* v. *Bissonauth Dey* (1875), 15 B. L. R., 361.

[4] *Chunilal* v. *Mangaldas* (1891), I. L. R., 16 Bom., 592. *See* this case explained and distinguished in *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (1907), I. L. R., 34 Cal., 51.

[5] *Alimooddeen* v. *Wuzeer Ali* (1874), 23 W. R., 52.

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It has been decided that under section 26 of Act XV of 1877, enjoyment of light and air in order to be "as of right" and to result in the acquisition of an easement must be open and manifest, not furtive or invisible.[1]

The enjoyment must, as has already been observed, be the enjoyment as it were of an owner, who is content to enjoy his rights openly because he has no object in concealing his enjoyment of them.

Since, under the Limitation Acts, it is essential that the enjoyment should be "as of right," it is clear that permissive user is as fatal to the acquisition of easements under the present law as under the former law.[2]

Enjoyment "as of right" prescribed by Act XV of 1877 for the acquisition of *all* easements.

It is also important to observe that whilst section 26 of the Indian Limitation Act XV of 1877 makes enjoyment "as of right" a necessary factor in the acquisition of *all* easements, an express exception in this respect arises under the English Prescription Act in favour of easements of light and under the Indian Easements Act, V of 1882, in favour of easements of light or air, and of support, inasmuch as in section 3 of the English statute,[3] and in the first two paragraphs of section 15 of the Indian Act,[4] which respectively prescribe the quality of enjoyment necessary to gain such easements, the words "as of right" are omitted.

Exception in English Prescription Act and Indian Easements Act.

Effect on a tenant's powers of acquisition.

The result is that whereas under the English statute[5] and the Indian Easements Act respectively, a tenant can by virtue of such omission acquire for his own benefit an easement of light, or air, or of support, subject, as regards the latter Act, to the provisions of section 12, third paragraph,[6] and of section 16,[7] he cannot do so under the Indian Limitation Act,[8] since the principles which govern the relation of

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[1] *Mathuradas* v. *Bai Amthi* (1883), I. L. R., 7 Bom., 522.

[2] *See supra*, Part I, C.

[3] *See* App. I.

[4] *See* App. VII.

[5] *See supra*, Part I, B.

[6] *See* Chap. VI, Part I, and App. VII.

[7] *See infra*, Part III, and App. VII.

[8] *See Krishna* v. *Vencatachella* (1872), 7 Mad. H. C., 60 (64); *Udit Singh* v. *Keshi Ram* (1892), I. L. R., 14 All., 185; *Jeenab Ali* v. *Allabaddin* (1896), 1 Cal. W. N., 151; *Mani Chunder Chuckerbutty* v. *Baikanta Nath Biswas* (1902), I. L. R., 29 Cal., 363; 6 Cal. W. N., LXXVI. The same disability applies to tenants

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landlord and tenant and require that an easement shall be absolute, would preclude the enjoyment from being "as of right."[1]

Meaning of "without interruption."

With reference to the requirement that the enjoyment conferring the right should be "without interruption," it has repeatedly been held that unavoidable interruption in the user of such rights as are limited in their exercise to a particular period or season of the year, such as a right of passage by boats in the rainy season, is not an interruption which is fatal to the acquisition of the easement.[2]

Further, it has been held that the exercise of the right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation need not be continuous, provided it has been exercised for the statutory period during seasons of drought, when it could be taken advantage of.[3]

Under Limitation Acts knowledge of servient owner not essential.

It has been seen that in England, and under the law in India, prior to the Indian Limitation Acts, the knowledge of the servient owner is an essential condition to the acquisition of an easement against him. But under the Indian Limitation Acts the law appears to be different.

It has been decided by the Calcutta High Court that the Indian Limitation Act XV of 1877, under which easements are now usually acquired, has nothing to do with prescription or the presumption of a grant, and that though the conditions, as prescribed by the Act, governing the acquisition of easements are in the main the same as those which govern the acquisition of easements by prescription, yet there is nothing in the Act which renders the knowledge of the servient owner

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with permanent rights, *Mani Chunder Chuckerbutty* v. *Baikanta Nath Biswas*, *ubi sup.* *See supra*, Part I, B, for a similar disability under the common law.

[1] *See* the cases last cited, and *supra*, Part I, B.

[2] *Ramsoonder Baral* v. *Woomakant Chuckerbutty* (1864), 1 W. R., 217; *Oomer Shah* v. *Ramzan Ali* (1868), 10 W. R., 363; *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory* (1874), 22 W. R., 302; *Shaikh Muhomed Ansar* v. *Shaikh Sefatoollah* (1874), 22 W. R., 340; *Koylash Chunder Ghose* v. *Sonatun Chung Barpoie* (1881), I. L. R., 7 Cal., 132; 8 Cal. L. R., 281.

[3] *Badhu Mandal* v. *Maliat Manda* (1903), I. L. R., 30 Cal., 1077.

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necessary to the acquisition of the right, or refers the twenty years' enjoyment to any grant, express or implied, from the servient owner.

Arzan v. *Rakhal Chunder Roy Chowdhry.*

In *Arzan* v. *Rakhal Chunder Roy Chowdhry*,[1] the easement claimed was a right of way, and it was found in the first Court that the enjoyment had continued peaceably and openly, and without interruption, for more than twenty years, but both the first Court and the Court of original appeal dismissed the suit on the ground, amongst others not material to the present question, that the owners of the servient tenement had not been aware of the plaintiff's user of the way.

On second appeal Garth, C.J., in delivering the judgment of the Calcutta High Court, pointed out the distinction between the acquisition of an easement by prescription and the acquisition of an easement under the Indian Limitation Act, and between the principles governing those two methods of acquisition respectively. In demonstrating that this distinction was intended by the Indian Legislature, the Chief Justice pointed out that there was no provision in the Indian Limitation Act corresponding with section 7 of the English Prescription Act, though there was a provision in section 27 which answered to section 8 of the Prescription Act, and which protected, under certain conditions, the rights of reversioners.

Use of words "peaceably and openly."

He thought it probable that the words "*peaceably and openly*," which were not in the English Act, had been introduced into the Indian Act for the very purpose of preventing the acquisition of easements by stealth or by a wrongfully contested user, although actual knowledge of the user on the part of the servient owner might not be necessary.

"Open."

It may also be said, in this connection, that the use of the word "*open*" was apparently, in the opinion of the Legislature, sufficient to meet the situation, for if the servient owner was in possession, an open user was clearly capable of interruption by him, whereas if he was out of possession section 27 provided for such an emergency. By the light of

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[1] (1883) I. L. R., 10 Cal., 214.

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this decision the requirements of the Indian law, so far as they are embodied in the Indian Limitation Act, are satisfied by proof in the case of easements of light and air, of a peaceable enjoyment (and in the case of other easements, of a peaceable and open enjoyment) for twenty years, without interruption, as an easement, and as of right. And the result of such enjoyment is to make the right absolute and indefeasible.[1]

"Peaceable."

The word "peaceable" appears to have been introduced in conformity with the rule in England that a contentious user throughout the prescriptive period is fatal to the acquisition of an easement.[2]

Thus, constant interruptions though not acquiesced in for a year may shew that the enjoyment never was of right, but contentious throughout.[3] But if the enjoyment as of right has begun, no interruption for less than a year can affect it.[4] This statement of the English rule may be found a useful guide to the meaning of the word "peaceable" in the Indian Act.

Difference between section 26, para. 4, and corresponding provision in English Act.

It is important to observe that there is a material difference between the fourth paragraph of section 26 of Act XV of 1877 and the corresponding provision of section 4 of the English Prescription Act.

In the Indian Enactment each of the periods of twenty years is to be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested, whereas the language of the English section is that "each of the respective periods "of years hereinbefore mentioned shall be deemed and taken "to be the period next before some suit or action wherein the "claim or matter to which such period may relate shall have "been or shall be brought into question."

In England there are cases to shew that in dealing with this part of section 4 of the English Act, the Courts have

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[1] *Arzan v. Rakhal Chunder Roy Chowdhry, ubi sup.*

[2] *Eaton v. Swansea Waterworks Co.* (1851), 17 Q. B., 267.

[3] *Eaton v. Swansea Waterworks Co., ubi sup.*

[4] *Ibid.*

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held that the claimant of an easement in order to satisfy the length of enjoyment required by the statute was bound to shew some act of user within one year of action.[1]

But these were cases of a right of way, an affirmative easement, in which the plaintiff was not suing for a declaration of an easement or for prevention or removal of its interruption or obstruction, but in trespass, and it was the defendant who set up the easement as a plea in bar.

It is obvious that this class of case could only arise with reference to affirmative easements as involving something done by the defendant on the land of the plaintiff, and could have no application to negative easements which involve no act of the dominant owner on the servient tenement.

Thus, these were not cases where the plaintiff alleging an easement had to bring his suit within a particular time and the question of limitation became material,[2] but cases where the defendant in pleading an affirmative easement was told by the Court that his plea would be rejected on the ground of insufficient enjoyment unless he could shew some act of user within one year of action.

The question was clearly one of user as required by the statute and not one of limitation with which the statute had nothing to do.

To construe the question as one of limitation would be to attribute to the judges a usurpation of legislative powers whereby they had not only provided for affirmative easements a period of limitation inapplicable to negative easements, but had also practically repealed the provisions of the Statute of Limitations.

For these reasons it is impossible to suppose that it was their intention to do anything more than to supply a reasonable and practical interpretation of section 4 of the English Prescription Act.

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[1] *Parker* v. *Mitchell* (1840), 11 A. & E., 788; *Louce* v. *Carpenter* (1851), 6 Exch., 825; 20 L. J. Exch., 374.

[2] As it was in *Bonomi* v. *Backhouse* (1859), E. B. & E., 655; (1861) 9 H. L. C., 503, and in *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127.

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But the framers of the Indian Limitation Acts, whether or not they had the English decisions before their eyes, have converted what is a question of *user* into a question of *limitation*, and by those enactments respectively,[1] have in effect prescribed a period of limitation of two years for the bringing of all suits relating to easements depending for their acquisition on long enjoyment, excepting those suits for which the second schedule has expressly provided.[2] Effect of s. 26, para. 4.

The result is that in India plaintiffs have been placed in the same position as defendants were under the English decisions, and are obliged to submit to the operation of a rule the effect of which is to prescribe an enjoyment which is often impossible, and thus to create a limitation of suits by a process which was unknown to the English statute and was never contemplated by the English Courts.

Thus, all persons suing under the Act for a declaration of their right to an easement by long enjoyment or for a preventive or mandatory injunction to protect the same, must do so by reason of this section within two years after the interruption complained of.[3]

The foregoing observations are also applicable to the fifth paragraph of section 15 of the Indian Easements Act which contains a similar provision.

The severity of this rule of limitation as applicable to the case of easements acquired by long enjoyment was apparently recognised by the Privy Council in the case of *Maharani Rajroop Koer* v. *Syed Abul Hossein*.[4] In that case the plaintiff sued to establish his right to an artificial watercourse constructed and enjoyed by him for more than twenty years prior to the obstruction complained of, but as he had not brought his suit within two years after the said obstruction, the High Court of Calcutta considered section 27 of Act IX *Maharani Rajroop Koer* v. *Syed Abdul Hossein.*

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[1] Act IX of 1871, s. 27, fourth para.; Act XV of 1877, s. 26, fourth para.

[2] *I.e.* by Arts. 36, 37, and 38; *see* App. IV.

[3] *See Luchmi Persad* v. *Tilukdharee Singh* (1875), 25 W. R., 295.

[4] (1880) I. L. R., 6 Cal., 394; 7 Cal. L. R., 529; 7 I. A., 240.

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of 1871 (the corresponding section to section 26 of Act XV of 1877) to be a bar to his claim.

The Privy Council appreciating the difficulty of the plaintiff's position, supposing section 27 of the Limitation Act to be exclusively applicable to his case, took a different view, and adopted the expedient of withdrawing the case from the operation of the Act, and deciding it on the basis of prescription by presuming from the facts as found by the Lower Courts the existence of a grant at some distant period of time.

In excluding the operation of the Act they removed the necessity for proof of enjoyment within two years of suit and saved the plaintiff's right. In order to reach this conclusion they decided that the Act was neither prohibitory nor exhaustive, but remedial, and that it did not exclude other titles or modes of acquiring easements.[1]

Punja Kuvarji v. *Bai Kuvar*[2] was a case on all fours with the Privy Council case just cited.

The plaintiff had from time immemorial, or at any rate for more than twenty years prior to the date of disturbance by the defendant, enjoyed the right of having the rainwater from his house carried off over the defendant's land.

The defendant obstructed the passage of the water through his land, and the plaintiff did not institute his suit for more than two years after the date of the disturbance.

It was held that the plaintiff having a title evidenced by immemorial user did not require the aid of the Limitation Act, and that, as the obstruction complained of was a continuing nuisance in respect of which the cause of action occurred *de die in diem*, his claim was not barred by any provision in the Limitation Act, but, on the contrary, was saved by the express provisions of section 23 of that Act.[3]

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[1] *See* further as to this, *infra*, p. 463.

[2] (1881) I. L. R., 6 Bom., 20.

[3] *Sec.* Act XV of 1877, s. 23, provides that in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues; *see* App. IV and further Chap. XI, Part III (5).

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Before leaving the subject of the fourth paragraph of section 26 of Act XV of 1877, it will be useful to refer to the case of *Koylash Chunder Ghose* v. *Sonatun Chung Barooie*,[1] which, as regards affirmative easements, places an intelligible construction on the section read with illustration (*b*) in relation to the question whether it is enjoyment of the right claimed as required by the section, or actual user or exercise thereof as required by the illustration, which is to be shewn within two years of suit.

Construction of s. 26 read with illustration (*b*).

Koylash Chunder Ghose v. *Sonatun Chung Barooie.*

The plaintiffs in this case sued for the obstruction of a right of passage for boats over the defendant's land when it was covered with water during the rainy season.

The suit was instituted on the 6th of April, 1878. The plaintiffs proved a peaceable, open, and uninterrupted enjoyment of the right as an easement, and as of right, for more than twenty years, but they proved no actual user since November, 1875. Upon these facts the Subordinate Judge before whom the case came on first appeal dismissed the suit on the strength of illustration (*b*). On second appeal the High Court differed from the Subordinate Judge, and in remanding the case, rejected illustration (*b*) on the ground that the language of the section pointing to one view of the law, and that of the illustration to another, the section should clearly be preferred, as any illustration ought never to be allowed to control the plain meaning of the section itself, especially when the effect would be to curtail a right which the section in the ordinary sense would confer. The decision is important, and it will be useful to quote from the judgment of the Court delivered by Garth, C.J. He says[2]: "The 26th "section of the Limitation Act only renders it necessary, so "far as we can see, that the *enjoyment of the right* claimed "should have continued till within two years before suit. The "section says not a word as to any *actual user* or *exercise* of "the right within the two years. It is obvious to us that the "enjoyment intended by the section means something very

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[1] (1881) I. L. R., 7 Cal., 132.

[2] *Ibid.* at p. 135.

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"different from actual user. In order to establish the right, "the *enjoyment* of it must continue for twenty years; but in "the case of discontinuous easements, this does not mean "that actual *user* is to continue for the whole period of twenty "years."

"On the contrary, there may be days and weeks and "months, during which the right may not be exercised at "all, and yet during all those days and weeks and months, "the person claiming the right may have been in full "enjoyment of it."

"The easement with which we have to deal in the present "case affords a remarkable illustration of this. The right "which the plaintiffs claim can only be used by them during "the two or three months of the year when the defendant's "land is flooded; and if there were a lack of rain, it is "probable, that even for twenty or twenty-one months, the "right might not be exercised at all; and yet, so long as the "plaintiffs' right was not interfered with, whenever they had "occasion to use it, their enjoyment must, we conceive, be "considered as continuing during all the year round. Unless "this were so, a person in the plaintiffs' position, who could "only use his right during a short period of the year, could "never gain a prescriptive right at all. Illustration (*b*), there-"fore, which would seem to make 'enjoyment' equivalent to "'actual user' must, we think, be rejected, especially as the "latter clause, which follows the words 'the suit shall be "'dismissed,' is obviously quite unnecessary for the purposes "of the illustration."

This view of the section places it in accord with the spirit of previous Indian and English decisions which do not make it essential to the acquisition of the right that there should be a continuous user throughout the whole of the prescriptive period, provided the cessations of actual user are consistent with the enjoyment required by law.[1]

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[1] *See supra*, p. 453, and *infra*, p. 461, as to meaning of "interruption," and Part I, B & C; and also *Sham Churn Auddy* v. *Tariney Churn Banerjee* (1876), I. L. R., 1 Cal., 422 (430); *Budhu Mandal* v. *Maliat Mandal* (1903), I. L. R., 30 Cal., 1077.

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The *explanation* to section 26 provides that "nothing is "an interruption within the meaning of this section, unless "where there is an actual discontinuance of the possession or "enjoyment by reason of an obstruction by the act of some "person other than the claimant, and unless such obstruction "is submitted to, or acquiesced in, for one year after the "claimant has notice thereof and of the person making or "authorising the same to be made." Explanation to s. 26.

There is a similar provision in section 4 of the English Act, except that there is nothing in the latter enactment which makes it essential to an effectual interruption that the "interruption" should be "an actual discontinuance of the "possession or enjoyment by reason of an obstruction by "the act of some person other than the claimant," though the word has been so construed by the Court.[1]

The word "interruption" as used in the corresponding sections of the Limitation Acts does not mean any voluntary discontinuance of user by the claimant himself, but an obstruction or prevention of the user by some person acting adversely to the person who claims it.[2] Meaning of word "interruption."

It is clear that the person contesting the easement cannot deny knowledge of the user and yet allege that there has been an interruption within the meaning of the section.[3]

With reference to the condition that the obstruction in order to amount to an interruption within the meaning of the section must be submitted to or acquiesced in for one year after the claimant has notice thereof, it has been held in India, following the English rule, that in order to negative submission it is not necessary that the party interrupted should have brought an action or suit, or taken any active steps to remove the obstruction; it is enough if he has What is necessary to negative "acquiescence" in the interruption.

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[1] *The Plasterers' Co.* v. *The Parish Clerks' Co.* (1851), 6 Exch., 630.

[2] *See* Explanation to s. 27 of the Act IX of 1871, App. III, and to s. 26 of Act XV of 1877, App. IV; and *Sham Churn Auddy* v. *Tariney Churn Banerjee* (1876), I. L. R., 1 Cal., 422. The word has the same meaning in the Prescription Act, *supra*, Part I, B.

[3] *Arzan* v. *Rakhal Chunder* (1883), I. L. R., 10 Cal., 214.

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communicated to the party causing the obstruction that he does not submit to or acquiesce in it.[1]

Claims against Government prior to the Limitation Acts.

Prior to the Indian Limitation Acts there is no reason to doubt that, as against the East India Company, and subsequently as against the Crown, claims in the nature of easements and *profits à prendre* might be acquired by prescription.[2]

Question whether easements can be acquired against the Crown under Limitation Acts.

Secretary of State for India v. *Mathurabhai.*

But since the passing of the Indian Limitation Acts it is doubtful whether the provisions of these Acts can be used as against the Crown for the acquisition of easements.

The question was raised before the Bombay High Court in the case of *The Secretary of State for India* v. *Mathurabhai*,[3] where it was contended on behalf of the Government that section 26 of Act XV of 1877 is not applicable to a claim against the Secretary of State, according to the rule of construction, well-established in England[4] and applicable in India,[5] that the Crown, whose interests he represents, is never bound by a statutory enactment unless the intention of the Legislature to bind the Crown is clearly and unmistakeably expressed.[6]

Without expressing a decided opinion on the question, which was not necessary in the view they took of the case, the Court (Sargent, C.J., and Candy, J.), thought by reference to the English decisions, that the mere mention of the Crown in an Act could not be held to have the effect of making all its provisions applicable to the Crown,[7] and that section 26, being clearly in prejudice of the Crown's rights, the provisions of the

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[1] *Subramanya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335 (339). For the English rule, *see supra*, Part I, B.

[2] *Ponnusawmi Tevar* v. *The Collector of Madura* (1869), 5 Mad. H. C., 6; *Collector of Thana* v. *Dadabhai Bomanji* (1876), I. L. R., 1 Bom., 352 (361); *Secretary of State for India* v. *Mathurabai* (1889), I. L. R., 14 Bom., 213.

[3] *Ubi sup.*

[4] *See Perry* v. *Eames* (1891), 1 Ch., 658; *Wheaton* v. *Maple & Co.* (1893), 3 Ch., 48 (64).

[5] *Ganpat Putaya* v. *Collector of Kanara* (1875), I. L. R., 1 Bom., 7 (9); *Secretary of State for India* v. *Mathurabai*, *ubi sup.*

[6] The Crown is not mentioned in the sections of the Limitation Act applicable to easements (*see* Apps. III and IV).

[7] The Crown is expressly mentioned in Arts. 15, 16, 17, and 149 of Act XV of 1877.

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Act could not, on principle, be said to afford sufficiently clear evidence of an intention to include the Crown in section 26. They thought that it might be fairly inferred from the provision in section 15 of the Indian Easements Act, V of 1882, fixing a period of sixty years in lieu of twenty years for acquiring an easement against the Crown that the Crown's rights were not actively present to the minds of the Legislature when enacting section 26.[1]

Under the English Prescription Act.

Under the English Prescription Act, easements (except easements of light[2]), and *profits à prendre* can be acquired against the Crown, the reason being that the Crown is expressly mentioned in sections 1 and 2, and is not mentioned in section 3.[3]

The Indian Limitation Acts remedial, not prohibitory, nor exhaustive.

It has already been incidentally remarked, and it must here be repeated, that the Indian Limitation Act, like the English Prescription Act, does not exclude or interfere with other titles and modes of acquiring easements.

The Privy Council has laid it down that the object of the Act of 1871 was to make more easy the establishment of easements by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements.[4] "But," say their Lordships, "the Statute is remedial and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements."[5]

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[1] The point was apparently not taken in *Arzan* v. *Rakhal Chunder Roy Chowdhry* (1883), I. L. R., 10 Cal., 214, where a right of way was established against Government by proof of user of the necessary character for 30 or 40 years.

[2] *See* the reason for this exception suggested in *Wheaton* v. *Maple & Co.*, *ubi sup.*, and the comments on Goddard on Easements, 6th Ed., 289, 290.

[3] *Perry* v. *Eames*; *Wheaton* v. *Maple & Co.*, *ubi sup.* *See* these sections fully set out in App. I.

[4] *Rajroop Koer* v. *Syed Abul Hossein* (1880), I. L. R., 6 Cal., 394; 7 Cal. L. R., 529; 7 I. A., 240.

[5] The same observations apply to Act XV of 1877; *see Srinivasa Rau Saheb* v. *Secretary of State* (1880), I. L. R., 5 Mad., 226; *Sri Raja Vericharla* v. *Sri Raja Satracharla* (1881), I. L. R., 5 Mad., 253; *Punja Kuvarji* v. *Bai Kuvar* (1881), I. L. R., 6 Bom., 20; *Achul Mehta* v. *Rajan Mehta* (1881), I. L. R., 6 Cal., 812; *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1881), I. L. R.,

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Modhoosoodun Dey v. *Bissonauth Dey.*

The same view was expressed by Markby, J., in *Modhoosoodun Dey* v. *Bissonauth Dey*,[1] when he said, "It has indeed been "contended that the Statute" (meaning Act IX of 1871) "excludes other modes of acquiring an easement by enjoyment. "But this is clearly not so. There are no words in the Statute "to which such a construction can be given, and with the "history of the English Prescription Act before them, it can "scarcely be supposed that the Legislature here, had they "intended any such exclusion, would have omitted to express "their intentions."

Not Acts of prescription. *Arzan* v. *Rakhal Chunder Roy Chowdhry.*

In *Arzan* v. *Rakhal Chunder Roy Chowdhry*,[2] Garth, C.J., after stating that the Indian Limitation Act had nothing to do with prescription, said: "Of course rights of way as well as "other easements, may still be claimed in this country by pre-"scription, see *Rajrup Koer* v. *Abul Hossein*; and when they "are so claimed the principles which apply to their acquisition "in England will be equally applicable in this country."

Delhi and London Bank v. *Hem Lall Dutt.*

In *The Delhi and London Bank* v. *Hem Lall Dutt*[3] it is observed by Trevelyan, J., that "the object of the Prescription "Act and of the provisions in the Limitation Act was, not to "enlarge the extent and operation of the easements [of light "and air], but to provide another and more convenient mode "of acquiring such easements, a mode independent of any legal "fiction and capable of easy proof in a Court of Law."[4]

Section 27.

Section 27 of Act XV of 1877 is as follows: "Provided "that when any land or water upon, over, or from which any "easement has been enjoyed or derived, has been held under

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7 Cal., 132; 8 Cal. L. R., 231; *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1882), I. L. R., 8 Cal., 952; 10 Cal. L. R., 577; *Arzan* v. *Rakhal Chunder* (1883), I. L. R., 10 Cal., 214; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839; *Secretary of State* v. *Mathurabhai* (1889), I. L. R., 14 Bom., 223, *Eshan Chandra Samanta* v. *Nilmoni Singh* (1908), I. L. R., 35 Cal., 851.

[1] (1875) 15 B. L. R., 361.

[2] (1883) I. L. R., 10 Cal., 214.

[3] (1887) I. L. R., 14 Cal., 839.

[4] *See* a similar view expressed with regard to the Prescription Act in *Kelk* v. *Pearson* (1871), L. R., 6 Ch. App., 809; *City of London Brewery Co.* v. *Tennant* (1878), L. R., 9 Ch. App., 212; *Gardner* v. *Hodgson's Kingston Brewery Co.* (1903), App. Cas. at p. 236; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at pp. 190, 191.

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"or by virtue of any interest for life or any term of years "exceeding three years from the granting thereof, the time of "the enjoyment of such easement during the continuance of "such interest or term shall be excluded in the computation "of the said last-mentioned period of twenty years, in case the "claim is, within three years next after the determination of "such interest or term, resisted by the person entitled, on "such determination, to the said land or water."

A corresponding provision is to be found in section 8 of the English Prescription Act,[1] except that the operation of the section is limited to ways, watercourses, or use of water, and the section is somewhat differently worded.[2]

The corresponding provision in the Indian Limitation Act, IX of 1871, section 28, excluded easements of light and air, whereas section 27 of the present Act applies to all easements.

Effect of the section.

It is to be observed that the section protects the rights of reversioners against the acquisition of any easement upon or over any land or water, which has been the subject of an outstanding estate for more than three years, provided the claim is resisted by them within three years after coming into possession.

It has been seen that as against the servient owner in possession section 26 prescribes a particular mode of enjoyment, whilst section 27 provides for all cases where the servient owner is out of possession for more than three years.

Part III.—Under the Indian Easements Act.

Section 3, repealing portion of Act XV of 1877.

By section 3 of the Indian Easements Act, the definition of "easement" contained in section 3 of the Indian Limitation Act, and sections 26 and 27 of that Act are repealed in the territories to which the former Act extends.[3]

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[1] *See* App. I.

[2] *See* this commented on *supra*, Part I, B, under "Disability under s. 8 of Prescription Act."

[3] Bombay, North-Western Provinces and Oudh, Madras, Central Provinces, and Coorg. As to the terms of the section, *see* App. VII.

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Sections 15 and 16.

Sections 15 and 16 of the Indian Easements Act [1] correspond to sections 26 and 27 of the Indian Limitation Act, XV of 1877,[2] but differ therefrom in the following important respects (that is to say) :—

(1) As regards section 15—

(*a*) In omitting the words "*as of right*" in reference to the acquisition of prescriptive easements of light or air and of support.[3]

(*b*) In adding Explanations I, III, and IV.

(*c*) In adding the provision that the period of prescription as against Government is to be sixty years instead of twenty.[4]

(2) As regards section 16, in omitting the word "water."

Length and character of enjoyment same as under the Indian Limitation Acts.

As under the Limitation Acts the enjoyment must be *nec vi*, *nec clam*, *nec precario* without interruption, and for twenty years, except as against the Government, when an enjoyment for sixty years is required.[5]

Exception as against Government.

A similar proviso to that contained in Explanation I to section 15 is to be found in sections 1, 2, and 3 of the English Prescription Act.[6]

As under Limitation Act Statutory title must be acquired in suit.

Under paragraph 5 of section 15, as under paragraph 4 of section 26 of the Indian Limitation Act XV of 1877, the statutory title to an easement must be acquired in a suit.

Like Limitation Act is not exclusive.

On the analogy of the decisions relating to the Indian Limitation Acts it may be inferred that the Indian Easements Act does not exclude other modes of acquiring easements, there being no words in the Act to which such a construction can be given.[7]

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[1] *See* App. VII. Note the different wording of s. 8 of the English Prescription Act (App. I) ; and *see supra*, Part I, B, the comment on the use of the word "easement" in s. 16 of the I. E. Act.

[2] *See* App. IV.

[3] For the effect of this omission on the power of a tenant to acquire easements, *see* Chap. VI, Part I, and *supra*, Part I B, and Part II.

[4] *See* the last para. of s. 15.

[5] S. 15, last para., App. VII.

[6] App. I and App. VII, and *see Sultan Nawaz Jung* v. *Rustomji N. Byramji Jijibhoy* (1899), I. L. R., 24 Bom. (P. C.) 156 ; L. R., 26 Ind. App., 184.

[7] *See supra*, Part II.

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Thus when a right of easement is not claimed under the Act, but by prescription, proof of enjoyment within two years next before suit is not necessary.

Explanation IV to section 15 follows the rule laid down in *Goldsmid* v. *Tonbridge Wells Improvement Commissioners*.[1]

Expl. IV to s. 15. *Goldsmid* v. *Tonbridge Wells Improvement Commissioners.*

[1] (1866) L. R., 1 Ch. App., 349. And *see supra*, Chap. III, Part III, F (1).

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CHAPTER VIII.

Part I.—Extent and Mode of Enjoyment of Easements.

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Part I.—Extent and mode of enjoyment of Easements.

It is of obvious importance to both dominant and servient owners that the extent and mode of enjoyment of easements should be clearly defined in order to avoid, so far as may

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be possible, any misconception as to what would be an excessive user on the one side and a wrongful obstruction on the other.

It is proposed, therefore, under this heading to consider, *first*, the general rules governing the extent and mode of enjoyment of easements by whatsoever method acquired; *secondly*, the rules governing the extent and mode of enjoyment of easements according as they are acquired, (*a*) by express or implied grant, (*b*) by presumption of law, (*c*) by prescription or long enjoyment; and *thirdly*, in particular, the rules governing the extent and mode of enjoyment of easements of way.

A.—General Rules as to the extent and mode of enjoyment of Easements.

Easement cannot be used by dominant owner for any purpose unconnected with dominant tenement.

It is well established that an easement must be used by the dominant owner for some purpose connected with the enjoyment of the right of property in the dominant tenement.[1]

In other words, an easement cannot be used for the advantage of any tenement but the dominant tenement, or for any purpose unconnected with the enjoyment of the dominant tenement.

The justice and good sense of this are obvious, otherwise the user of the restrictive right might be extended in all sorts of ways not contemplated by the servient owner, the burthen imposed on the servient tenement might be indefinitely increased, and the easement in relation to such extended user would be nothing more than a right in gross.

Thus, if a man is the owner of two houses and acquires a right of way over his neighbour's land for the advantage of one of them, he exceeds the legal limits of his easement if he uses it for the purpose of going to the other house.[2]

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[1] *See Harris* v. *Flower & Sons* (1905), 91 L. T. 816, *supra*, Chap. II; I. E. Act, ss. 4 and 21, App. VII.

[2] *Howell* v. *King* (1685), 1 Mod., 190; *Laurton* v. *Ward* (1697), 1 Ld. Raym., 75; *Culliandoss* v. *Cleeland* (1863), 2 Ind. Jur., O. S. 15; *Harris* v. *Flower & Sons*, *ubi sup.*; I. E. Act, s. 21, ill. (*a*), App. VII. The rule that a right of way acquired for one purpose cannot be used

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The same principle was recognised by the House of Lords in the case of *Simpson* v. *The Mayor of Godmanchester*,[1] where the appellant sued the respondent corporation for an injunction to restrain them from trespassing upon or interfering with his locks on the River Ouse: The respondent corporation set up in defence a prescriptive right to open such locks in time of flood in order to protect their lands from inundation. The House decided in their favour. In the course of his judgment Lord Watson says[2]: "If the appellant "had been able to shew that the corporation had carried their "operations beyond what was necessary to protect their own "lands, so as to clear other lands of flood water when their "own were neither flooded nor threatened with inundation, "the appellant would have been entitled to restrain the "respondents from doing more than was reasonably necessary "in order to protect their dominant lands. But he has made "no such complaint and there is no evidence in this case "which could support it."

Simpson v. *The Mayor of Godmanchester.*

Another essential rule relating to the use of easements is that the dominant owner shall exercise his right in the mode least onerous to the servient owner.[3]

Dominant owner must exercise his right in mode least onerous to servient owner.

This rule proceeds upon the same ground as the last, namely, that as an easement in restricting the ordinary rights of property imposes a burthen upon the servient tenement, such burthen shall be made as light as possible consistently with the proper and necessary enjoyment of the easement.

This rule finds its ordinary illustration in the case of affirmative easements, as where a man having the selection of a right of way over his neighbour's land is bound to exercise his choice in a reasonable manner, the proper measure

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for another falls within the same principle. *See Senhouse* v. *Christian* (1787), 1 T. R., 560; 1 R. R., 300; and the other cases *infra* under "Extent and mode of enjoyment of easements of way."

[1] (1897) App. Cas., 696.

[2] At p. 702.

[3] *Abson* v. *Fenton* (1823), 1 B. & C., 195; *Dudley* v. *Horton* (1826), 4 L. J. Ch. (O. S.), 104; *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665; on appeal, I. L. R., 8 Cal., 677; I. E. Act, s. 22, App. VII.

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of his conduct being what a reasonable man would do under similar circumstances on his own land.[1]

If possible, he must take the nearest way.[2]

So where a man has a right of way over his neighbour's land for a particular purpose, the law imposes upon him the duty of exercising his easement in a way which will least affect the servient owner in his enjoyment of the servient tenement.[3]

And it is not only the servient owner who is entitled to complain of an excessive, improper, or offensive user, but also any person having a right of easement over the same subject-matter.[4]

Correlative obligation of servient owner.

Correlative to this obligation on the part of the owner of the dominant tenement is the obligation imposed on the owner of the servient tenement that he shall not so deal with it as to render the easement over it incapable of being enjoyed, or more difficult of enjoyment, by the owner of the dominant tenement.[5]

This obligation extends also to all accessory easements necessary for the full and free enjoyment of the principal easement.[6]

On this principle neither owner of a divided party-wall can pull down his half of the wall or stop up his half of any flue used for the purpose of the other owner's house.[7]

Dominant owner must not increase burthen on the servient tenement.

It is a rule of general application that the owner of the dominant tenement cannot by any additional or changed user thereof throw an increased burthen on the servient tenement.[8]

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[1] *Abson* v. *Fenton*, *ubi sup.*

[2] *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), 1 Ch. D., 362.

[3] *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett*, *ubi sup.*

[4] *Ibid.*

[5] *Jones* v. *Pritchard* (1908), 1 Ch., 630 (637) ; 24 Times L. R., 309 (310) ; Gale on Easements, 8th Ed., p. 507; and *see* further *infra*, Part III.

[6] Gale, *ubi sup.*

[7] *Jones* v. *Pritchard*, *ubi sup.*

[8] *Cooper* v. *Hubbock* (1860), 30 Beav., 160 ; 7 Jur. N. S., 457 ; *Tapling* v. *Jones* (1865), 11 H. L. C., 290 ; *Lanfranchi* v. *Mackenzie* (1867), L. R., 4 Eq., 421 (428); *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), 1 Ch. D., 362; *Bradburn* v. *Morris* (1876), 3 Ch. D., 812; *Prorabutty Dabee* v. *Mohendro Lall*

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Thus, it has been held that a right of way used for the advantage of a tenement while it continued as farming land could not be used either for building purposes whilst the tenement was being converted into a building site, or for all purposes connected with the houses when they had been erected.[1]

The test to be applied in each case is whether any additional burthen has been, or will be, imposed on the servient tenement by the way in which the dominant owner has used or seeks to use this easement.[2]

Thus, where no additional burthen was imposed on the servient tenement, a way used for agricultural purposes was allowed to be used for the purposes of a factory.[3]

In regard to easements of light, the effect of an alteration of the dominant tenement will hereafter be more particularly considered in connection with the abandonment and forfeiture of such easements[4]; for the present it is sufficient to state that any alteration in the ancient lights which in a sensible degree prejudices the owner of the servient tenement or diminishes the enjoyment of his property is an infringement of the above rule and a material alteration according to the decisions.[5]

The opening of a new window in a substantially different position from that occupied by an old window, or the enlargement of an old window so as substantially to destroy its identity, is a material alteration,[6] for which, as will be seen,

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Bose (1881), I. L. R., 7 Cal., 453; *Scott* v. *Pape* (1886), 31 Ch. D., 554; *Jesang* v. *Whittle* (1899), I. L. R., 23 Bom., 595; *Desai Bhaoorai* v. *Desai Chunilal* (1899), I. L. R., 24 Bom., 188; *Bai Hariganga* v. *Tricamlal* (1902), I. L. R., 26 Bom., 374; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (202); *Milner's Safe Co., Ltd.* v. *G. N. and City Ry. Co.* (1907), 1 Ch., 208 (226); *Ankerson* v. *Connelly* (1907), 1 Ch., 678.

[1] *Wimbledon and Putney Commons Conservators* v. *Dixon*; *Desai Bhaoorai* v. *Desai Chunilal*, *ubi sup.*; and *see* further *infra*, C.

[2] *Jesang* v. *Whittle*, *ubi sup.*

[3] *Ibid.*

[4] *See* Chap. IX, Part II, C (1) and D (2).

[5] *Cooper* v. *Hubbock*, *ubi sup.*, and *see* the cases cited in the next footnote.

[6] *Cooper* v. *Hubbock* (1862), 30 Beav., 160; 7 Jur. N. S., 457; *Tapling* v. *Jones* (1865), 11 H. L. C., 290; *Scott* v. *Pape* (1886), 31 Ch. D., 554; *Colls* v. *Home and Colonial Stores, Ltd.* (1904).

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the servient owner has his remedy in acts of obstruction on the servient tenement.[1]

According to English law, the owner of ancient lights can alter in form and structure the aperture through which he obtains his light even so as to increase the amount of such light, provided he does not destroy the substantial identity of the ancient light.[2] Thus, it has been held in England that the removal of old casements and the substitution in their place of others of lighter construction without increasing the aperture occupied by their frames but resulting in an increased access of light and air, is not such additional user as the servient owner will be entitled to obstruct.[3]

I. E. Act, s. 28, cl. (c).

As regards the measure of the prescriptive right to light, the law as enacted by section 28 (*c*) of the Indian Easements Act is not in accord with the English law as finally settled by the decision in *Colls* v. *Home and Colonial Stores, Limited*,[4] and it would accordingly appear that under the Indian Easements Act any alteration in ancient lights which increased the quantity of light and air accustomed to enter the aperture during the whole of the prescriptive period would constitute an excessive user which the servient owner, subject to the provisions of section 31,[5] would be entitled to obstruct on the servient tenement. But it is presumed that in Bengal and in other parts of British India where the Indian Easements Act is not in force the English law would still be applied.

The opening of the new window or any substantial alteration in the identity of the old one is not a wrongful, but an innocent, act on the part of the dominant owner who may use his land as he pleases, but the servient owner is at liberty

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App. Cas., 179 (196) (202); *Ankerson* v. *Connelly* (1906), 2 Ch., 544; (1907), 1 Ch., 678; *Andrews* v. *Waite* (1907), 2 Ch., 500; *Provabutty Dabee* v. *Mohendro Lall Bose* (1881), I. L. R., 7 Cal., 453; *Bai Hariganga* v. *Tricamlal* (1902), I. L. R., 26 Bom., 374.

[1] *See infra.*

[2] *Turner* v. *Spooner* (1861), 1 Dr. & Sm., 467; 30 L. J. N. S. Ch., 801; and *see Cooper* v. *Hubbock*; *Scott* v. *Pape*; *Colls* v. *Home and Colonial Stores, Ltd.*; *Ankerson* v. *Connelly*; *Andrews* v. *Waite*, *ubi sup.*

[3] *Turner* v. *Spooner*, *ubi sup.*

[4] (1904) App. Cas., 179; and *see* Chap. III, Part I, and App. VII.

[5] *See* App. VII.

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to counteract it by building on his own land, subject to the conditions which the law imposes.[1]

Such additional user, whilst not increasing the original easement, cannot diminish it so as to deprive the dominant owner of his right to so much light as may reasonably be required for the ordinary user of inhabitancy and business.[2]

Right of obstruction of excessive user by servient owner.

Any act on the part of the dominant owner which substantially increases the burthen on the servient tenement may be obstructed thereon by the owner thereof.

It will be perceived that this right of obstruction is really one of the ordinary rights of ownership available either before the acquisition of the easement by what is technically known as "interruption," or after the acquisition of the easement when the limits of the right are exceeded.

In the case of affirmative easements the obstruction must be the obstruction of a trespass, whereas in the case of negative easements the obstruction is the rightful act of the servient owner counteracting the no less rightful act of the dominant owner.

Thus, to put the case of an affirmative easement, if a man who has acquired a right to irrigate his land by placing a board or fender across a stream fastens the board or fender by means of stakes, which proceeding he has no prescription to justify, the person whose rights in the stream are restricted by the easement may remove the stakes, but not the board.[3]

So if a man having acquired a right to a stone weir erects buttresses, the person whose ordinary rights of property are restricted by the stone weir, may remove the buttresses, though he may not demolish the weir.[4]

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[1] *See Tapling* v. *Jones* (1865), 11 H. L. C., 290; *Aynsley* v. *Glover* (1874), L. R., 18 Eq., 544; L. R., 10 Ch. App., 283; *Scott* v. *Pape* (1886), 31 Ch. D., 554; *Procabutty Dabee* v. *Mohendro Lall Bose* (1831), I. L. R., 7 Cal., 453, and *infra* with reference to the question of obstruction of excessive user by servient owner.

[2] *See Colls* v. *Home and Colonial Stores, Ltd.*, *ubi sup.*, and further, Chap. IX, Part II, D (2).

[3] *Greenslade* v. *Halliday* (1830), 6 Bing., 379.

[4] *Ibid.*

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In case of easement of light, right of obstruction limited.

So, too, in regard to an easement of light, any alteration in the dominant tenement substantially changing its identity, or the identity of the ancient lights, will constitute an excessive user which the owner of the servient tenement may obstruct on his own land.[1]

Tapling v. *Jones.*

But, in the case of an easement of light, it is now well established that this right of obstruction is subject to certain limitations, which were authoritatively laid down by the House of Lords in *Tapling* v. *Jones*.[2]

Renshaw v. *Bean.* *Hutchinson* v. *Copestake.*

The earlier cases of *Renshaw* v. *Bean*[3] and *Hutchinson* v. *Copestake*[4] had decided that if the owner of a dwelling-house with ancient lights opens new windows in such a position as that the new windows cannot conveniently be obstructed by the servient owner without obstructing the old, the latter has, nevertheless, the right to obstruct so long as the new windows continue in existence.

An examination of the judgments in these cases shews, that the opening of the new windows was treated as a wrongful act done by the owner of the ancient lights, which occasions the loss of the old right he possessed.[5]

Tapling v. *Jones.*

But in *Tapling* v. *Jones*[6] the House of Lords took the opposite view, and in overruling *Renshaw* v. *Bean* and *Hutchinson* v. *Copestake* (so far as the judgments therein are based on *Renshaw* v. *Bean*[7]), decided that if the owner of

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[1] *See* the cases above cited in reference to a material alteration, and *Chandler* v. *Thompson* (1811), 3 Camp., 80.

[2] (1865) 11 H. L. C., 290, and *see infra*.

[3] (1852) 18 Q. B., 112.

[4] (1860) 8 C. B. N. S., 102 in the Common Pleas, and similarly the judgments of Crompton and Hill, JJ., in the Court of Exchequer (1861), 9 C. B. N. S., 863, but it is questionable whether the judgments of the other three judges (Blackburn, J., Channell and Bramwell, BB.) in the Court of Exchequer bear the same construction, and are really at variance with the decision in *Tapling* v. *Jones, infra*; *see Newson* v. *Pender* (1884), 27 Ch. D., 55, 56, 60, 61.

[5] *Per* Lord Westbury, L.C., in *Tapling* v. *Jones* (1865), 11 H. L. C., 290. It is doubtful, however, whether this criticism can be applied to the judgments of Blackburn, J., and Channell and Bramwell, BB., in the Court of Exchequer (1861), 9 C. B. N. S., 863, *see supra*.

[6] (1865) 11 H. L. C., 290.

[7] *i.e.* the judgments in the Common Pleas and the judgments of Crompton and Hill, JJ., in the Court of Exchequer, *see supra*. *Davies* v. *Marshall* (1861), 7 Jur. N. S., 720, appears to be open to the same objection.

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ancient lights opens new windows or enlarges his old ones, the adjoining proprietor may so build as to obstruct the new openings, provided he can do so without obstructing the old; otherwise he may not obstruct at all.

Thus, instead of the dominant owner losing his old rights, the servient owner merely remains restricted in building to the extent of the old easement.

In this connection the reasoning of the House of Lords in *Tapling* v. *Jones* clearly exposes the fundamental fallacy involved in the decision in *Renshaw* v. *Bean*, and in the opinions of the judges in *Hutchinson* v. *Copestake* so far as they are based on *Renshaw* v. *Bean*, and shews that what is assumed to be a wrongful act in the earlier cases is merely the legitimate enjoyment by the dominant owner of his proprietory rights, an innocent act involving in the eye of the law no injury or wrong to the adjoining owner who is at liberty to build up against the new or enlarged openings, subject always to the condition that by so doing he does not obstruct the old windows, for no innocent act can destroy the existing right of the dominant owner, or give any enlarged right to the adjoining owner.

But where a dominant owner has constructed new windows in the place of his old windows, and the new windows do not substantially include the area of the old windows, but only a small portion thereof, he is not entitled to complain of an obstruction which shuts out the light from his new windows.[1]

And further, where the owner of the dominant tenement so reconstructs and changes it in character as to leave only a small portion of his ancient light in existence, he cannot afterwards complain of any interference therewith which before the rebuilding would not, according to the rule laid down in *Colls' case*,[2] have entitled him to relief.[3]

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[1] *Newson* v. *Pender* (1884), 27 Ch. D., 43, and *see* Chap. IX, Part II, D (2).

[2] (1904) App. Cas., 179, 196, 202, and *see* Chap. III, Part I.

[3] *Ankerson* v. *Connelly* (1907), 1 Ch., 678.

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In India the principle established in *Tapling* v. *Jones*,[1] and applied in *Scott* v. *Pape*,[2] in regard to the obstruction of new, or enlarged ancient, apertures,[3] has been recognised outside the Indian Easements Act,[4] and by section 31 of the Indian Easements Act.[5]

Provabutty Dabee v. *Mohendro Lall Bose*.

In *Provabutty Dabee* v. *Mohendro Lall Bose*,[6] Wilson, J., said: "With regard to the law, the question is set at rest by "the judgment of the House of Lords in *Tapling* v. *Jones*, and "it is clear that if a man has a right to light from a certain "window and opens a new window, the owner of an adjoining "house has a right to obstruct the new opening if he can do "so without obstructing the old, but if he cannot obstruct "the new without obstructing the old, he must submit to the "burden."[7]

Since *Colls' case* effect of enlargement of ancient aperture under the general law.

In this connection, however, the effect of the recent decision in *Colls* v. *Home and Colonial Stores, Limited*,[8] which has finally settled the law in relation to the disturbance of ancient lights, should not be lost sight of.

It has been seen that since that decision it is not enough that the light should be less than before; the obstruction in order to be actionable must amount to a nuisance.

Thus, whilst under the previous law the enlargement of an ancient aperture laid the servient owner under the disadvantage of submitting to it if he could not obstruct it without interfering with the pre-existing right, which, according to the rulings displaced by *Colls' case*, was the right to the whole, or substantially the whole, amount of light which had had access to the ancient aperture, a similar alteration

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[1] *Ubi sup.*

[2] (1886) 31 Ch. D., 554.

[3] *See* this question further considered in Chap. IX, Part II, in connection with the abandonment and forfeiture of easements of light, in which respect the decision in *Scott* v. *Pape*, *ubi sup.*, has not been affected by *Colls' case* (*see Andrews* v. *Waite* (1907), 2 Ch., 500, 509), except in so far as the position of the servient owner has been improved, *see infra*.

[4] *Provabutty Dabee* v. *Mohendro Lall Bose* (1881), I. L. R., 7 Cal., 453.

[5] *See* App. VII.

[6] (1881) I. L. R., 7 Cal., 453.

[7] These observations apply with equal force to the enlargement of an old window, *Provabutty Dabee* v. *Mohendro Lall Bose*; *Scott* v. *Pape*, *ubi sup.*

[8] (1904) App. Cas., 179. *See* this case fully considered in Chap. III, Part I.

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since *Colls' case* not only cannot increase the burthen on the servient tenement, but actually places the servient owner in a better position than formerly by enabling him to obstruct without reference to the size of the ancient aperture, subject only to the condition that the obstruction of the enlarged aperture does not amount to a nuisance, for, though it is obvious that what would be an actionable obstruction of the enlarged aperture would also be an actionable obstruction of the ancient aperture, since the greater includes the less, the increased capacity for light on the dominant tenement would proportionately reduce the capacity for a nuisance on the servient tenement.[1]

Since *Colls' case* effect of decreasing ancient aperture.

So, too, since *Colls' case*, it is really by *decreasing* the size of the old opening that the dominant owner increases the burthen on the servient tenement,[2] and is accordingly precluded from complaining of an obstruction which before the change was effected would not have been an actionable nuisance.[3]

The same reasoning would not of course apply to cases under the Indian Easements Act.[4]

In case of easement of support, effect of increasing burthen on servient tenement.

In the case of an easement of support, an alteration of the dominant tenement throwing a greater burthen on the servient tenement than that justified by the acquired right has this result that the servient owner is not liable for any damage which his acts may have caused the dominant owner by reason of the modern alteration. And the result is the same whether the alteration was the act of the dominant owner or a third person. In either case, as Lord Justice James points out in *Corporation of Birmingham* v. *Allen*,[5] it does not lie in the mouth of the dominant owner to say, "I have done no wrong; "I have done nothing that I was not lawfully entitled to do. "I have worked out my mines under my land as far as I "might lawfully do so, and, having done that, I have now

Corporation of Birmingham v. *Allen*.

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[1] *See* further in this connection, Gale on Easements, 8th Ed., 547, 548.

[2] *Ibid.*

[3] *Ankerson* v. *Connelly*, *ubi sup.*

[4] *See supra* under I. E. Act, s. 28, cl. (*c*), and Chap. III, Part I.

[5] (1877) 6 Ch. D., 284, 293.

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"a cavity under my land, and I now warn you, my neighbour, "that you must not follow my example and work your mines, "because if you work your mines in addition to my working "my mines you will let down my house or the surface from "which I have removed my support." The Lord Justice cites authority against a position of that kind. He says: "In the "case of the Court of Exchequer, *Partridge* v. *Scott*,[1] as it "appears to me, we have a direct authority for saying that "where a man has himself diminished the subjacent support "of his own land, he has no right of action or complaint "against his neighbour whose acts by reason of that previous "weakening have caused subsidence of the plaintiff's soil. "That we have authority for."

In the case first above cited it appeared in evidence that between the land of the plaintiffs and that of the defendants who were colliery owners, there was an intermediate piece of land the coal under which had been worked out some years before by a third party. The effect of such excavation was that when the defendants came to work the coal under their land, subsidence was caused of the surface of the plaintiffs' land and the buildings thereon erected, and on these facts the plaintiffs asked for an injunction against the defendants.

The plaintiffs themselves, or their predecessors in title, had allowed coal to be extracted from under their land, and it was found that such excavation did interfere with the support and increase subsidence, though not materially.

The Master of the Rolls decided that the plaintiffs' case failed because the defendants could not be considered adjacent owners so as to be liable for support, and the acts of the plaintiffs and the intervening owners, by reason whereof the subsidence has occurred, could not deprive the defendants of the right of working their mines as they pleased, even if such working caused damage to the plaintiffs.

This decision was affirmed by the Court of Appeal. Lord Justice James made the following observations[2]: "I agree with

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[1] (1838) 3 M. & W., 220.

[2] *Ubi sup.* at p. 292.

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"the Master of the Rolls that it seems a very startling thing "to say that a man who has got a property in valuable mines "can be deprived of those valuable mines because some one "else between him and somebody else, a third person, has "been doing something with his property. Whatever you call "it, an easement or a natural right incident to property, or a "right of property, it seems to me those are only different "modes of expressing the origin of the right, and do not "express any difference in the right itself. Whatever it be, "there must be, whether you use those terms or not, the idea "and the substance of a dominant and servient tenement; "and it does seem to me rather startling to find that the "servient tenement can have its servitude or obligation "increased by the act of the owner of the dominant tenement, "or by the act of a third person intervening between the "owners of the dominant and servient tenement."

Effect of increase or diminution of dominant tenement by alluvion or diluvion.

By section 29 of the Indian Easements Act no easement is affected by any change in the extent of the dominant or servient tenement, except where the extent of an easement being proportionate to the extent of the dominant tenement, the easement is proportionately increased or diminished according as the dominant tenement is increased by alluvion or diminished by diluvion.[1]

Effect of severance or partition of dominant tenement.

The severance or partition of the dominant tenement into two or more parts annexes all its easements to the severed portions, but the limits of the rights remain what they were at the time of severance, for no additional burthen can by reason thereof be imposed on the servient tenement.[2]

Tyrringham's case.

In *Tyrringham's case*,[3] it was resolved that common appendant may be apportioned, because it is of common right; so if A has common appendant to 20 acres of land, and enfeoffs B of part of the said 20 acres, the common shall be apportioned, and B shall have common *pro rata* and no

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[1] *See* App. VII.

[2] *See Ram Pershad Narain Tewaree* v. *Court of Wards* (1874), 21 W. R., 152; I. E. Act, s. 30, App. VII; Gale on Easements, 8th Ed., pp. 86, 506; and *infra*, the English authorities.

[3] (1584) 4 Rep., 36*b*.

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prejudice accrues to the tenant of the land in which common is to be had, for he shall not be charged with more upon the matter than he was before the severance.[1]

Codling v. *Johnson.*

In *Codling* v. *Johnson*[2] the defendant in an action for trespass pleaded a right of way in respect of land which had formerly been part of an uninclosed common, but which had afterwards been inclosed under the provisions of an Act of Parliament and allotted to the defendant's ancestor. The existence of an immemorial right of way having been proved, the Court decided that the defendant and each of the allottees of land within the inclosure were entitled to a right of way.

Harris v. *Drewe.*

In *Harris* v. *Drewe*[3] it was held that the right to sit in a pew may be apportioned, so where a pew has been appropriated to a particular house and the house is afterwards divided into two parts, the occupiers of each part have some right to the pew and may maintain an action in respect of it.

Position of person claiming easement after partition of dominant tenement.

A person claiming an easement after partition or severance of the dominant tenement must shew that he comes within the description of the grantee of the easement, either being the grantee himself or claiming through him, and that the easement has ceased to be appurtenant to the dominant tenement, as a whole, and belongs to the severed portion.[4]

Bower v. *Hill.*

Failure to shew this lost the plaintiff his case in *Bower* v. *Hill*.[5]

That was an action upon the case for obstruction of a right of way claimed by the plaintiff from his close unto and along a certain stream or watercourse. It appeared at the trial that the close in respect of which the plaintiff claimed the right, abutted on the stream or watercourse in question, and had formerly constituted parcel of one entire property called the *King's Head Inn* or yard; but about five years prior to action the occupier of the *King's Head Inn* had put up a pair of gates at the bottom of his yard, and had thereby

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[1] *See* also *Baring* v. *Abingdon* (1892), 2 Ch., pp. 395, 402.

[2] (1829) 9 B. & C., 933.

[3] (1831) 2 B. & Ad., 164.

[4] *Bower* v. *Hill* (1835), 2 Bing. N. C., 339; 2 Scott, 535.

[5] *Ubi sup.*

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separated the yard from the stream or watercourse, leaving the space of ground between the yard and the stream in possession of the plaintiff. There had been no user of the stream for the last sixteen years, but before that period it appeared that there had been a user for various purposes.

Littledale, J., directed a non-suit on two grounds, the one which is material to the present question being that the right of way had been proved to belong to the *King's Head Inn* and yard as one entire subject.

A rule, which was granted by the Court of Common Pleas to set aside the non-suit, was discharged on the same ground, the Court rejecting, as an unreasonable construction of the grant of the easement as appurtenant to the *King's Head Inn* and yard as a whole, the plaintiff's contention that the right of easement attached to each and every part of the land which formed any part of the *King's Head* yard, and that as he, the plaintiff, had the possession of the frontage of the ground adjoining to the stream, he had also a right of passage which was the subject of the grant; since the grant itself, if presumed to have ever existed, was still in full force, and there had been no release or extinguishment of the original easement, but only a temporary suspension of it, nor was there any incapacity on the part of the occupier of the *King's Head Inn* to resume the use of it. Independently of this there was the broad ground that if the grant had been produced in evidence, the plaintiff could not have brought himself within the description of the grantee.

In *Newcomen* v. *Coulson*,[1] which was a case of a severance of lands under an Inclosure Act, Jessel, M.R., said: "The "first point made was this: It was said that as this was a "grant to the owner, and owners for the time being, of the "lands, if the lands became severed, the owners of the severed "portions could not exercise the right of way. I am of "opinion the law is quite clear the other way. Where the "grant is in respect of the lands and not in respect of the

Newcomen v. *Coulson*.

[1] (1877) 5 Ch. D., 133.

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"person, it is severed when the lands are severed, that is, "it goes with every part of the severed lands. On principle, "this is clear."

Indian Easements Act, s. 30.

Section 30 of the Indian Easements Act provides that where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage; provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any) under which the division was made, and in the case of prescriptive rights, with the user during the prescriptive period.[1]

Novel user, when lawful.

Subject to the rule above stated that the owner of an easement may not place a new burthen or restriction upon the servient tenement, or do anything whereby the original and rightful burthen or restriction is increased, a dominant owner has the right to alter the mode and place of enjoyment of the easement.[2]

Thus, an alteration affecting the quality merely of the dominant tenement and not its substance will not destroy an easement of light appurtenant to it.[3]

Upon the same principle it has been held that the conversion of fulling mills into corn mills is not such a change of the mode of enjoyment as will affect the right to the use of a watercourse for working the mills.[4]

Similarly, in the case of an easement to pollute water, the method of the pollution may be changed so long as the pollution itself is not increased.[5]

So, too, a change by the owner of the dominant tenement not in the purpose for which a way is used,[6] or in the direction of the way,[7] but in the system by which such purpose is

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[1] *See* App. VII.

[2] *See* I. E. Act, s. 23, and exception, and the illustrations, App. VII.

[3] *See Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179, 202, 211, explaining *Martin* v. *Goble* (1808), 1 Camp., 320.

[4] *Luttrel's case* (1738), 4 Rep. 86*a*.

[5] *Baxendale* v. *McMurray* (1867), L. R., 2 Ch. App., 790.

[6] *See infra*, C (2).

[7] *Ibid.*

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effected, is not necessarily such a material aggravation of the easement as to entitle the servient owner to its discontinuance.[1]

Thus, an easement of way used for the purpose of cleaning the privies of the dominant owner is not materially aggravated by a change of system which causes such privies to be cleansed daily instead of less frequently as before.[2]

B.—Rules as to the extent and mode of enjoyment of Easements in relation to the different methods of acquisition.

(1) *Easements created by deed of grant.*

General rule. The general rule that the extent and mode of enjoyment of easements created by deed of grant are limited by the particular instrument from which the rights and intentions of the parties are to be ascertained,[3] must be taken with this

Qualification. qualification that, in construing the terms of a grant, reference should be made, whenever necessary, to the state of surrounding circumstances existing at the time of the grant,[4] so that the right of user claimed may be reasonably consistent therewith.[5]

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[1] *Jadulal Mullick* v. *Gopal Chandra Mukerji* (1886), I. L. R., 13 Cal., 136; L. R., 13 Ind. App., 77.

[2] *Ibid.*

[3] *Hodgson* v. *Field* (1806), 7 East., 613; *Allan* v. *Gomme* (1840), 11 A. & E., 759; *Henning* v. *Burnet* (1852), 8 Exch., 187; *Northam* v. *Hurley* (1853), 1 E. & B., 665; *Whitehead* v. *Parks* (1858), 8 H. & N., 870; 27 L. J. Exch., 169; *Williams* v. *James* (1867), L. R., 2 C. P., 577; and *see* I. E. Act, s. 28, App. VII.

[4] As to the time at which the rights of the parties to a conveyance executed in pursuance of an agreement are to be ascertained, *see supra*, p. 341.

[5] *Wood* v. *Saunders* (1875), 44 L. J. Ch., 514; *Kay* v. *Oxley* (1875), L. R., 10 Q. B., 360 (368); *Cannon* v. *Villars* (1878), 8 Ch. D., 415; *Roe* v. *Siddons* (1888), 22 Q. B. D., 224 (233); *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46, 54, 57. *See* also *Myers* v. *Catterson* (1889), 43 Ch. D., 470, and in particular the judgment of Bowen, L.J., *Ibid.*, at p. 480; *Broomfield* v. *Williams* (1897), 1 Ch. at p. 615. The same rule applies to devises, *Phillips* v. *Low* (1892), 1 Ch., 47; *Milner's Safe Co., Ltd.* v. *G. N. and City Ry. Co.* (1907), 1 Ch., 208. In any such inquiry the purpose for which the dominant tenement has been granted and the state of the grantor's knowledge at the time of the grant are material elements in ascertaining the intention of the parties and the extent of the easement, *see Caledonian Ry. Co.* v. *Sprot* (1856), 2 Macq., Sc. App., 449; *N.-E. Ry. Co.* v. *Elliot*

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Where, however, there is nothing in the circumstances of the case, or in the situation of the parties, or in the situation of the land, to restrict the extent and mode of enjoyment of the right granted, the words of the deed or act granting the right should have their full operation.[1]

(2) *Quasi-easements.*

The extent and mode of enjoyment of *quasi*-easements must be measured by the extent and mode of their enjoyment at the time of the severance of the dominant and servient tenements.

Wheeldon v. *Burrows*.

The rule in *Wheeldon* v. *Burrows*[2] points obviously to this conclusion, and the decision in *Quicke* v. *Chapman*[3] supports it.

The rule in *Wheeldon* v. *Burrows* (already noticed in reference to the acquisition of *quasi*-easements) is that on the grant by the owner of an entire property of part of that property *as it is then used and enjoyed*, there will pass to the grantee all those continuous and apparent easements, meaning *quasi*-easements, which are necessary to the reasonable enjoyment of the property granted, and which have been *and are at the time of the grant* used by the owner of the entirety for the benefit of the part granted.[4]

(3) *Easements of necessity.*

General rule.

In the case of an easement of necessity the rule broadly stated is that the user of the right must be limited by the actual necessity of the case.

Holmes v. *Goring*.

In *Holmes* v. *Goring*[5] Best, C.J., after referring to the proposition that "a way of necessity, when the nature of it is

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(1860), 1 J. & H., 145; *Robinson* v. *Grave* (1873), 21 W. R., 223; 27 L. T. N. S., 648; *Cannon* v. *Villars*, *ubi sup.*; *Aldin* v. *Latimer Clark, Muirhead & Co.* (1894), 2 Ch., 437; *Fredk. Betts, Ltd.* v. *Pickford's, Ltd.* (1906), 2 Ch., 87.

[1] *United Land Co.* v. *Great Eastern Ry. Co.* (1875), L. R., 10 Ch. App., 586.

[2] (1879) 12 Ch. D., p. 49. *See* also *Holmes* v. *Goring* (1824), 2 Bing., 76.

[3] (1903) 1 Ch., 659.

[4] *See supra*, p. 338.

[5] (1824) 2 Bing., 76 (84).

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"considered, will be found to be nothing else than a way by "grant," proceeds to enunciate the correct rule. It is a grant, he says, "of no more than the circumstances which raise the "implication of necessity require should pass. If it were "otherwise, this inconvenience might follow, that a party "might retain a way over 1000 yards of another's land, when "by a subsequent purchase he might reach his destination "by passing over 100 yards of his own. A grant, therefore, "arising out of the implication of necessity cannot be carried "further than the necessity of the case requires, and this "principle consists with all the cases which have been "decided."

At what time necessity should be measured.

In relation to the use to which the dominant tenement may be put, the question arises as to the point of time to which the actual necessity is to be referred. Is the actual necessity to be judged by the state of circumstances existing at the time of the grant, or by the purposes for which at any future time the dominant tenement may be used? The answer is that the state of circumstances existing at the time of the grant must determine the necessity of the case. Otherwise the necessity, which is the foundation of the right, might be converted into a mere question of convenience, changing its character according as the dominant owner chose to alter the mode of his enjoyment of the dominant tenement.

Corporation of London v. *Riggs*.

The principle is laid down in the case of *Corporation of London* v. *Riggs*,[1] where the question was raised whether the right to a way of necessity to and from a landlocked close over the surrounding land is a general right of way for all purposes, or whether it is limited to such a right of way as was suitable or necessary for the enjoyment of the close in the condition it happened to be at the time the right first arose. The point was one of first impression and was elucidated by Sir George Jessel, the Master of the Rolls, in his usually clear and convincing manner.

After referring to an observation of Lord Chancellor Cairns

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[1] (1880) 13 Ch. D., 798.

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in *Gayford* v. *Moffat*,[1] from which it was obvious that that very eminent judge thought a way of necessity meant a way suitable for the user of the premises at the time when the way of necessity was created, he proceeds as follows[2]:—

"Well, now, if we try the case on principle—treating this "right of way as an exception to the rule—ought it to be "treated as a larger exception than the necessity of the case "warrants? That of course brings us back to the question, "What does the necessity of the case require? The object of "implying the re-grant, as stated by the older judges, was that "if you did not give the owner of the reserved close some right "of way or other, he could neither use nor occupy the reserved "close, nor derive any benefit from it. But what is the extent "of the benefit he is to have? Is he entitled to say, I have "reserved to myself more than that which enables me to enjoy "it as it is at the time of the grant? And if that is the true "rule, that he is not to have more than necessity requires, "as distinguished from what convenience may require, it "appears to me that the right of way must be limited to that "which is necessary at the time of the grant; that is, he is "supposed to take a re-grant to himself of such a right of way "as will enable him to enjoy the reserved thing as it is. That "appears to me to be the meaning of a right of way of "necessity. If you imply more, you reserve to him not only "that which enables him to enjoy the thing he has reserved "as it is, but that which enables him to enjoy it in the same "way and to the same extent as if he reserved a general right "of way for all purposes: that is—as in the case I have before "me—a man who reserves two acres of arable land in the "middle of a large piece of land is to be entitled to cover the "reserved land with houses, and call on his grantee to allow "him to make a wide metalled road up to it."

"I do not think that is a fair meaning of a way of "necessity: I think it must be limited by the necessity at "the time of grant; and that the man who does not take the

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[1] (1868) L. R., 4 Ch. App. at p. 135.

[2] 13 Ch. D. at p. 806.

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"pains to secure an actual grant of a right of way for all "purposes is not entitled to be put in a better position than "to be able to enjoy that which he had at the time the grant "was made. I am not aware of any other principles on which "this case can be decided."

Esubai v. *Damodar Ishvardas.*

The English rule that a way of necessity must be limited by the necessity at the time of grant was applied by the Bombay High Court in the case of *Esubai* v. *Damodar Ishvardas*,[1] where the plaintiff having, on a piece of land surrounded by the defendant's land and granted to the plaintiff's predecessor in title for building purposes, erected a substantial building with a privy and claimed a right of way over the defendant's land to the privy as a way of necessity, it was held that the suitable enjoyment of the dwelling implied the use of a privy wherever it might be thought fit by the occupants of the dwelling to build one, and that the plaintiff was accordingly entitled to build a privy and consequently, also, to have a way of necessity for access by a sweeper to the privy when built.

Indian Easements Act, s. 28, para. 2.

The same rule is observed in the second paragraph of section 28 of the Indian Easements Act.[2]

In considering the limits of a way of necessity, the extent to which and the purposes for which the way has been granted are proper questions to be determined.

Serff v. *Acton Local Board.*

Thus in *Serff* v. *Acton Local Board*,[3] where land was conveyed to the local board with knowledge on the part of the grantors of the purpose for which it was to be used by the grantees, namely, that of sewage works, and the only way to the grantees' land was a warple way over the grantor's land and formerly used for the purposes of cultivation, it was held that such way passed to the grantees for all necessary purposes in connection with the sewage works.

Selection of the way. By whom to be made.

On the creation of a way of necessity the person by whose act the way is created, that is, the grantor, has the right to select the way, provided it be reasonably convenient to the

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[1] (1891) I. L. R., 16 Bom., 552.

[2] *See* App. VII.

[3] (1886) 31 Ch. D., 679.

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grantee; but if he does not do so, the grantee has the right to select the way.[1]

In the exercise of this right the grantee must select such direction as a person of reasonable and ordinary skill would select, and must adopt such mode of making the road as a prudent and rational person would adopt, if he were making the road over his own land, and not over some one else's.[2]

In the case of a devise it is obviously impossible for the testator, by whose act the way is created, and who is dead, to do any subsequent act of selection; and if the line of way depends on his intention it must be discovered from the language of the will, understood with reference to the state of the property.[3]

Though it may be difficult to state what line the way is to take if the land before severance was so occupied as to afford no indication of what was the usual way in the testator's time, yet it rarely happens that there has not been some occupation of the land, as by a tenant, from which the measure of the right on the basis of its enjoyment at the time the will was made, may be derived.[4]

Only one way of necessity.

When there is more than one means of access to the grantee's tenement over the grantor's, the grantee is not entitled to more than one way of necessity which the grantor, or, failing him, the grantee, has the right to select according to the above-mentioned rule.[5]

Suggested relaxation of the rule in India.

The expediency of relaxing this rule in India in deference to caste or religion has been suggested,[6] but the suggestion has never been actually adopted.[7]

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[1] *Clarke* v. *Rugge*, 2 Roll. Abr., 60, pl. 17; *Clark* v. *Cogge* (1607), Cro. Jac., 170; *Packer* v. *Welstead* (1657), 2 Sid., 111; *Pearson* v. *Spencer* (1863), 1 B. & S., 571, 585; 3 B. & S., 761; *Bolton* v. *Bolton* (1879), 11 Ch. D., 968. And *see* Gale on Easements, 8th Ed. at p. 182; and I. E. Act, s. 14, App. VII.

[2] *Abson* v. *Fenton* (1823), 1 B. & C., 195.

[3] *Pearson* v. *Spencer*, *ubi sup.*

[4] *Ibid.*

[5] *Bolton* v. *Bolton* (1879), 11 Ch. D., 968.

[6] *See Esubai* v. *Damodar Ishvardas* (1891), I. L. R., 16 Bom., 552; *Municipality of City of Poona* v. *Vaman Rajarap Gholap* (1894), I. L. R., 19 Bom., 797 (801).

[7] *Krishnamarazu* v. *Marraju* (1905), I. L. R., 28 Mad., 495.

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When once a way of necessity has been ascertained, neither the dominant owner nor the servient owner has the right to vary it. It must remain the same way so long as it continues.[1]

Once ascertained cannot be varied.

(4) *Prescriptive easements.*

The extent and mode of enjoyment of prescriptive easements, other than easements of light and air, and easements to pollute air and water, are to be measured by the user as proved.[2]

General rule.

The first of the exceptions to the general rule above stated has already been fully considered.[3]

Exceptions. *Easements of light and air.*

As to the second, it is necessary to refer to the case of *Crossley & Sons, Limited* v. *Lightowler*,[4] which is the leading authority on the subject.

Right to pollute.

The plaintiff sued for an injunction to restrain the defendants as occupiers of large dye-works from polluting the water of a river in which the plaintiffs had riparian rights, and two questions, amongst others, arose for determination; first, whether there was a prescriptive right to pollute in the defendants, and secondly, if there was such right, what was the extent of it.

Crossley & Sons, Ltd. v. *Lightowler.*

It was proved in evidence that on the site of the dye-works established by the defendants in 1864, other dye-works had been used by former occupiers for twenty years prior to 1839, and the foul water from those works had been discharged into the stream. It appeared that the pollution, though similar in kind, was considerably less in degree than since the defendants' works had been in operation.

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[1] *Pearson* v. *Spencer* (1863), 1 B. & S., 571.

[2] *Howell* v. *King* (1686), 1 Mod., 190; *Lawton* v. *Ward* (1697), 1 Ld. Raym., 75; *Bealey* v. *Shaw* (1805), 6 East, 209; *Ballard* v. *Dyson* (1808), 1 Taunt., 279; *Williams* v. *James* (1867), L. R., 2 C. P., 577; *United Land Co.* v. *Great Eastern Ry. Co.* (1875), L. R., 10 Ch. App., 586 (590); *Desai Bhaoorai* v. *Desai Chunilal* (1899), I. L. R., 24 Bom., 188; *John White & Sons* v. *J. & M. White* (1906), App. Cas., 72. *See* also I. E. Act, s. 28, cl. (*e*), App. VII.

[3] *See* Chap. III, Part I, and *supra*, Part I, A.

[4] (1877) L. R., 2 Ch. App., 478.

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The first question having been established in favour of the defendants, it was contended on their behalf that the extent of their prescriptive right was to be measured by the means which they had of discharging their foul water into the river, and that if the watercourses used for such purpose by the former occupiers had not been enlarged, and it was proved they had remained the same, the plaintiffs had no ground of complaint.

In dealing with this contention Lord Chancellor Chelmsford said: "In answer to this argument, however, it may be "observed that the right upon which the defendants insist is, "not to pour water, but to pour foul water into the *Hebble*. "It may be difficult to fix a limit to such a right where the "quantity of fouling to which the prescription extends has "not been far exceeded, but where the excess is considerable "the proof will be comparatively easy."

"The user which orginated the right must also be its "measure, and it cannot be enlarged to the prejudice of any "other person."

This decision shews that the extent of an easement to pollute water is to be measured by the pollution as it existed at the commencement of the prescriptive period, and that such pollution is to be ascertained not by the means of discharge at the disposal of the owner of the easement, but by the amount of polluting matter which is poured into the stream. To the same effect is section 28, clause (*d*), of the Indian Easements Act.[1]

Method of pollution may be varied if extent of pollution not increased.

It appears that the mode of enjoyment of an easement to pollute may be changed either as regards the purpose for which the dominant tenement is used or as regards the material employed for such purpose, provided the pollution is not thereby substantially or tangibly increased.

Baxendale v. *McMurray*.

Thus in *Baxendale* v. *McMurray*,[2] where the plaintiff in suing for an injunction contended that the defendant's user of an ancient paper mill had become unlawful because for the

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[1] *See* App. VII.

[2] (1867) L. R., 2 Ch. App., 790.

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rags from which the paper had formerly been made during the prescriptive period a new vegetable fibre had been substituted, it was held that in order to succeed it was not sufficient for the plaintiff to shew that the defendant was using in the manufacture of paper a new and different material, but that he must go further and shew that a greater amount of pollution and injury arose from the use of such material, and that the onus of so shewing lay on the plaintiff.

C.—Extent and mode of enjoyment of Easements of Way.

(1) *Easement of way created by deed of grant.*

General rule. Question of construction.

When an easement of way is created by deed of grant or by will the extent and mode of its enjoyment must, in conformity with the general rule, be ascertained from the terms of the instrument itself, which are to be construed, if necessary, with reference to the circumstances existing at the date of the instrument.[1]

Cannon v. *Villars*.

In *Cannon* v. *Villars*,[2] which was an action to restrain the obstruction of a right of way, the defendant had entered into an agreement with the plaintiff to grant to him a lease of a house and a piece of vacant ground for the erection of a workshop for the purposes of his business as a gas engineer. It was a clause of the agreement that the plaintiff should not obstruct a gateway belonging to the defendant which communicated with a paved yard leading to the vacant ground except for the purposes of ingress and egress. The gateway and paved yard also constituted the only approach to the stables of the defendant, who carried on business in adjoining premises. The defendant having prevented the access of carts and vehicles to the plaintiff's workshop by blocking up the gateway and yard with his vans, the plaintiff brought this

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[1] *See supra*, Part I, B (1). A very material circumstance to be taken into consideration is the nature of the *locus in quo* over which the way is granted, *Cannon* v. *Villars* (1878), 8 Ch. D. 415 (420).

[2] *Ubi sup.*

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action. It was held that under the agreement the plaintiff was not restricted to a footway as the defendant contended, but that he had a general right of way as was reasonably required for the purposes of his business, and was entitled to an injunction accordingly. In the course of his judgment Jessel, M.R., said[1]: "Now I will say a word or two about the "law. As I understand, the grant of a right of way *per se* "and nothing else may be a right of footway, or it may be a "general right of way, that is a right of way not only for "people on foot but for people on horseback, for carts, "carriages, and other vehicles. Which it is, is a question of "construction of the grant, and that construction will of course "depend on the circumstances surrounding, so to speak, the "execution of the instrument. Now one of those circumstances, "and a very material circumstance, is the nature of the *locus* "*in quo* over which the right of way is granted. If we find a "right of way granted over a metalled road with pavement on "both sides existing at the time of the grant, the presumption "would be that it was intended to be used for the purpose for "which it was constructed, which is obviously the passage not "only of foot passengers, but of horsemen and carts. Again, "if we find the right of way granted along a piece of land "capable of being used for the passage of carriages, and the "grant is of a right of way to a place which is stated on the "face of the grant to be intended to be used or to be actually "used for a purpose which would necessarily or reasonably "require the passing of carriages, there again it must be "assumed that the grant of the right of way was intended to "be effectual for the purpose for which the place was designed "to be used, or was actually used.[2] . . . *Primâ facie* the grant "of a right of way is the grant of a right of way having "regard to the nature of the road over which it is granted and "the purpose for which it is intended to be used; and both

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[1] *Ibid.* at pp. 420, 421.

[2] *See Milner's Safe Co., Ltd.* v. *G. N. and City Ry. Co.* (1907), 1 Ch., 208 (222), where the same principle was applied to a devise.

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"these circumstances may be legitimately called in aid in "determining whether it is a general right of way, or a right "of way restricted to foot-passengers, or restricted to foot- "passengers and horsemen or cattle, which is generally called "a driftway, or a general right of way for carts, horses, "carriages, and everything else."

But when the instrument is silent as to the purpose for which the way is to be used, or expresses it in general terms, the question sometimes arises whether the measure of the right is to be defined by the actual use which is being made of the dominant tenement at the time of the grant or being unrestricted by the deed, is to be liberally construed in favour of the grantee.

The question is not without difficulty and the authorities are conflicting and require examination, but the modern view appears to be that if the grant of the way is in general terms, it should receive a liberal construction consistently with the surrounding circumstances of the case, without restriction to the use that was made of the way at the time of the grant.

Senhouse v. *Christian*.

In *Senhouse* v. *Christian*[1] Ashhurst, J., states the question to be whether under the general grant for the purpose of carrying coals, the party "has not a right to make *any such* "*way* as is necessary for the carrying of that commodity. "There are no great collieries in the northern part of the "kingdom where they have not those framed waggon-ways, "and the case itself expressly states that the defendant cannot "so commodiously enjoy this way in any other manner. There- "fore, under the original grant, he has a right to make a "framed waggon-way, which is necessary for the purpose of "carrying his coals." It appeared that this kind of waggon-way had been introduced into use since the date of the grant.

Dand v. *Kingscote*.

In *Dand* v. *Kingscote*[2] the defendant under a reservation of coal mines "together with a sufficient way-leave and stay- "leave to and from the mines, with liberty of sinking and

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[1] (1787) 1 T. R., 560; 1 R. R., 300.

[2] (1840) 6 M. & W., 174.

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"digging pit and pits," made a steam engine for the purpose of wiring and working the lower seams in the coalfield, constructed a railroad along which to carry his coal to a place of shipment, and made embankments and cuttings in two other places for a railroad which was abandoned.

These three acts were complained of by the plaintiffs as acts of trespass, but as regards the first two it was held that under the reservation the defendant was not confined to such a description of way as was in use at the time of the grant or in such a direction as was then convenient, but that according to the object of the reservation, which was to get coals *beneficially* to the owner of them, the defendant might have such a description of way and in such a direction as would be reasonably *sufficient* to enable the coal owner to get, from time to time, all the seams of coal to a reasonable profit.

As regards the third alleged act of trespass it was held that the defendant having by his conduct shewn the railway in that direction was unnecessary, the plaintiff was entitled to recover for the damage occasioned by it.

Allan v. Gomme.

The next case which calls for notice is that of *Allan* v. *Gomme*,[1] in which the matter in issue was whether the grant of "a right of way and passage over a close to a stable and "loft over the same, and the space and opening under the "said loft, and then used as a wood-house" precluded the defendant from using the right of way for the purposes of a cottage which had been built on the site of the opening under the loft. It was held that the meaning of such grant was not to give the defendant the right of way claimed by him, but to confine him "to the use of the way to a place which should be "in the same predicament as it was at the time of making the "deed."

The Court came to the conclusion that the words "then used as a wood-house" were descriptive merely and not restrictive of any manner of using the way consistent with the ground being left open, but that if any buildings were

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[1] (1840) 11 A. & E., 759.

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erected on it, it could no longer be considered as open for the purpose of the deed.

That the case was one of first impression is apparent from the observation of Lord Denman, C.J., that "there is "no direct authority to shew whether" if the use of a place "to and from which a way is by express words reserved or "granted, be completely changed, the way can still be con- "tinued to be used."

Henning v. *Burnet*.

In *Henning* v. *Burnet*[1] Parke, B., appears to have thought that the decision in *Allan* v. *Gomme* erred on the side of strictness, for he says—

"In *Allan* v. *Gomme* a more strict rule was laid down "than I should have been disposed to adopt; for it was said "that the defendant was confined to the use of the way to a "place which should be in the same predicament as it was at "the time of making the deed. No doubt, if a right of way "be granted for the purpose of being used as a way to a "cottage, and the cottage is changed into a tanyard, the right "of way ceases, but if there is a general grant of all ways to "a cottage, the right is not lost by reason of the cottage being "altered."[2]

Hawkins v. *Carbines*.

In *Hawkins* v. *Carbines*,[3] where a right of way was expressed to be through the gateway of the plaintiff "at all reasonable times," it was considered by the Court that the defendants who pleaded the easement had a right to make use of the way for all purposes for which persons ordinarily avail themselves of such a right, and were accordingly entitled, in the reasonable exercise of their right, to take carts through the gateway, load and unload, turn round, and go out again, although owing to an alteration of the premises by the grantor subsequent to the grant, they could not do so without slightly trenching upon the plaintiff's premises.

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[1] (1852) 8 Exch., 187, 192.

[2] This expression of opinion was referred to with approval by Malins, V.C., in *United Land Co.* v. *Great Eastern Ry. Co.* (1873), L. R. 17 Eq., 158 (167).

[3] (1857) 27 L. J. Exch., 44.

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Finch v. *Great Western Ry. Co.*

In a more recent case, that of *Finch* v. *Great Western Railway Company*,[1] it was considered that the proper view to take of *Allan* v. *Gomme* was that it established no general principle, but turned on the construction of a particular deed.

Watts v. *Kelson.*

In *Watts* v. *Kelson*[2] the plaintiff and defendant were owners of two adjoining properties which had formerly belonged to the same owner. The plaintiff's property was conveyed to him, together with a right of way through the gateway of the vendor, which opened into premises afterwards purchased by the defendant, to a wicket gate to be erected by the plaintiff at a given point, leading into a piece of garden ground, part of the premises purchased by the plaintiff. The plaintiff, having built a cart-shed on the piece of garden ground near where the wicket gate was to be erected, claimed a right of way for carriages to it.

The defendant contended that the right granted to the plaintiff by his conveyance was only a right of foot-way, but the Master of the Rolls held that the way, to which the plaintiff was entitled, was not to be limited to a foot-way, but was a way for all purposes.

He thought that, on the construction of the deed, it was intended to give the plaintiff a right of way for all purposes, and that there was nothing to limit the right of way in any particular manner.

He admitted the cases were difficult to reconcile, and considered that the test as to whether the burthen was heavier than was originally intended, was not altogether a reliable one, as with respect to a right of way it would be very difficult to say whether one burthen would be more onerous than another.

United Land Co. v. *Great Eastern Ry. Co.*

In *United Land Company* v. *Great Eastern Railway Company*[3] the plaintiff Company had become the owner of certain lands through which the defendant Company's railway ran. In accordance with a clause in the Act, under which

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[1] (1879) 5 Exch. D., 254.
[2] (1870) L. R., 6 Ch. App., 166.
[3] (1875) L. R., 10 Ch. App., 586.

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the Eastern Union Railway Company, the predecessor in title of the defendant Company, acquired so much of the plaintiff Company's lands as were necessary for the purposes of a railway, four level crossings were made for the convenient enjoyment and occupation of the remaining lands, which at the time of making the railway belonged to the Crown, and were marsh or pasture lands chiefly, but which afterwards passed into the ownership of the plaintiff Company and were offered by them for sale in building lots.

The defendant Company having thereupon given notice to the plaintiff Company that the level crossings were not to be used by the owners of any of the houses so to be built the plaintiff Company filed their bill praying that the defendant Company might be restrained from obstructing the plaintiff Company or their tenants from the free use of the level crossings.

The defendant Company contended that the plaintiff Company were entitled only to such use of the level crossings as was necessary for the convenient enjoyment and occupation of the lands exactly in their then existing condition and for the purposes for which they were then being used, but the Appeal Court, agreeing with Malins, V.C., was unable to accept this restricted view of the plaintiff Company's rights. In the opinion of the Court there was nothing which could operate to restrain the Crown, or the persons who claimed under the Crown, from using both level crossings for any purposes for which they could be used, subject, of course, to not improperly interrupting the traffic. Lord Justice Mellish, after distinguishing the measure of a prescriptive right of way, said[1]: "But when a right of way is created by grant, or by Act of "Parliament, then it must depend on the proper construc- "tion of the grant or Act of Parliament, whether the right of "way is to be used for all purposes, or for only limited pur- "poses. No doubt there are authorities that, from the descrip- "tion of the lands to which the right of way is annexed, and of

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[1] *Ubi sup.*, at p. 590.

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"the purposes for which it is granted, the Court may infer "that the way was intended to be limited to those purposes. "But if there is no limit to the grant, the way may be used "for all purposes."

Newcomen v. *Coulson.*

The same principle was applied in the later case of *Newcomen* v. *Coulson*,[1] where it was decided that the allottees of inclosures were entitled to use a way set out in pursuance of an award under an Inclosure Act not only for agricultural purposes for which the inclosures were being used at the time of the award, but for all purposes to which the land might be applied thereafter.

Finch v. *Great Western Ry. Co.*

Finch v. *Great Western Railway Company*[2] was decided on the same principle, and shews that where the grant of a way is general in its terms, the grantee is not confined to the user which existed at the time of grant, but may use the way for all purposes.

Thus, on the facts that where at the time of an award a way had been set out from a highway to certain of the enclosed lands and used merely for agricultural purposes, but afterwards upon some of the enclosed lands purchased by them, the defendant Company had built a cattle pen adjoining their railway and used the way in question for the passage to and from the highway of cattle conveyed on their railway, it was held that there was nothing in the award to prevent such user of the way. And it was pointed out that there was a clear distinction between such a case and the case of where there being a private right of way to one close it is used colourably with the real intention of going to a different though adjoining close, a mode of user which would not only be an unauthorised extension of the grant itself, but contrary to general principles, whether the right of way arose by grant or prescription.[3]

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[1] (1877) 5 Ch. D., 133.

[2] (1879) 5 Exch. D., 254, explained in *Harris* v. *Flower & Son* (1905), 91 L. T., 616, *see infra*.

[3] *See Skull* v. *Glenister* (1864), 16 C. B. N. S., 81; *Williams* v. *James* (1867), L. R., 2 C. P., 577; 16 L. T., 664; and *see Harris* v. *Flower & Sons* (1905), 91 L. T., 816. In the case last cited the defendants were using, and claimed to use, a

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Bejore leaving the subject of the extent and mode of enjoyment of easements of way acquired by deed of grant, it will be useful to notice a few cases which, by reason of the special construction placed upon the terms of the grant, do not fall within any of the general rules already considered. Cases of special construction.

In *Selby* v. *The Crystal Palace District Gas Company*[1] it was held that where the owner of a property had laid it out for building purposes and appropriated a portion of it to roads, and there had afterwards been a partition whereby the soil in the roads had vested in one of the co-sharers who covenanted that the owners and occupiers of all the land should have the full use and enjoyment of the roads "as if the same were public roads," the defendant Company could on the requisition of the owners and occupiers break the soil of the roads to lay down pipes without the assent of the covenantor and his representatives. *Selby* v. *Crystal Palace District Gas Co.*

In *Metcalfe* v. *Westaway*[2] it was held that the reservation to a railway company and their "assigns" of the free access *Metcalfe* v. *Westaway.*

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right of way, for the purpose of carrying building materials over the dominant tenement to be used on adjoining land belonging to them, and it was held that such a user was in excess of the grant and not permissible, and a declaration was made accordingly. In the same case *Finch* v. *G. W. Ry. Co.*, *ubi sup.*, was explained as follows by Romer, L.J.: "As to *Finch* v. *G. W. Ry. Co.*, that, no "doubt, is a case of considerable difficulty "—one which is upon the border line. I "gather that the judges in that case came "to the conclusion that what the railway "company were doing was done in sub- "stance for the due enjoyment of the "dominant land. They were using the "dominant land for the purpose of "penning cattle, and no doubt the cattle "were intended ultimately to be sent all "over the railway system. But the "ground of the decision was that the "railway company were entitled to use "the dominant land for the purpose of a "cattle pen, just as they might have "erected a slaughter-house upon it. To "my mind the case only turned on the "question of fact whether what the rail- "way company did was for the enjoy- "ment of the dominant tenement in "accordance with the right of way "granted. Similarly in the present case "the defendants might have erected a "building on the land coloured pink and "used it for a contractor's business, and "made use of the right of way for that "purpose; but what they are really doing "here is, under guise of the enjoyment "of the dominant tenant, to try and "make the right of way become a right "of way for the enjoyment of both "lands, the pink and the blue, and "using the land coloured pink as a mere "continuation of the right of passage "from the pink to the blue."

[1] (1862) 30 Beav., 606.

[2] (1864) 34 L. J. C. P., 113.

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to and from a slip for the purpose of working and repairing the same did not limit the word "assigns" to persons taking an estate in the land, but could include a licensee of the Company.

A grant of a way to a particular class of persons is to be distinguished from a general right of way to a place, and confers a right of foot-way only.[1]

When a right is granted to use a road to or from any part of the dominant tenement and there is nothing in the grant expressly limiting the grantee to one line of access, or to access only at the points, if any, where his land actually adjoins the way, the grantee is entitled to make use of any intervening strip of land belonging to the grantor between the road and the dominant tenement for the purpose of having access to the road, provided the right claimed is not unreasonable or destructive of the object of the grant. In other words, the grantee is not limited to one line or any particular points of access, but is entitled to cross any intervening strip of land belonging to the grantor, the denial of the right to use which would be inconsistent with the description contained in the grant.[2]

A right of way which is granted by deed to the grantee, "his executors, administrators, and assigns, undertenants and "servants" has been held to extend to all licensees of the grantee provided such extension of the right is consistent with the necessary or reasonable user of the dominant tenement.[3]

Nicol v. *Beaumont*.

In *Nicol* v. *Beaumont*[4] the right had been granted of passing on foot or with horses, cattle, carts and carriages over certain roads in the same manner and as fully as if the same roads were public roads.

It was held that this right of way in regard to its extent and manner of enjoyment must be taken as subject to the

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[1] *Cogsens* v. *Rose* (1871), L. R., 12 Eq., 366.

[2] *Cooke* v. *Ingram* (1893), 68 L. T., 671.

[3] *Baxendale* v. *North Lambeth Liberal and Radical Club, Ltd.* (1902), 2 Ch., 427.

[4] (1884) 50 L. T., 112.

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same rules as a public right of way for the same purpose, and accordingly comprehended the use of the whole road and not merely the part which had been used as the *via trita*.[1]

(2) *Prescriptive rights of way.*

It is a well-established proposition that where there is a right of way proved by user, the extent of the right must be measured by the extent of the user.[2]

This proposition is a logical consequence of the general rule of prescription that the knowledge of the servient owner is necessary to the acquisition of the right, for if there is no knowledge, there is no capability of interruption, and if there is no capability of interruption, there can be no prescription.[3]

Way acquired for one purpose cannot be used for an entirely different purpose.

Thus, a man cannot make use of a way during the prescriptive period for a particular purpose, and then when he has acquired an easement claim to use the way for an entirely different purpose. Nor does a right of way of any one kind necessarily include a right of way of any other kind.

Ballard v. *Dyson*.

In *Ballard* v. *Dyson*,[4] where the plaintiff claimed a right of way for cattle, but only proved a carriage-way, it was held that a carriage-way did not necessarily include a way for cattle.

Cowling v. *Higginson*.

In *Cowling* v. *Higginson*[5] Parke, B., said: "If the way "is confined to a particular purpose, the jury ought not to "extend it."

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[1] As to public rights of way, *see supra*, Chap. IV, Part II, A (2). In this respect it will be observed that the words "in the same manner and as fully as if the same roads were public roads" were the governing words in the grant. In the case of a private way *simpliciter*, the use of the whole road would not pass unless expressly or impliedly granted, *see supra*, C (1), and *infra*, C (2).

[2] *Howell* v. *King* (1686), 1 Mod., 190; *Lawton* v. *Ward* (1697), 1 Ld. Raym., 75; *Ballard* v. *Dyson* (1808), 1 Taunt., 279; *Williams* v. *James* (1867), L. R., 2 C. P., 577; 16 L. T., 664; *Finch* v. *Great Western Ry. Co.* (1879), 5 Ex. Ch. D., 254 (258); *Jadulal Mullick* v. *Gopal Chandra Mukerji* (1886), I. L. R., 13 Cal., 136; L. R., 13 Ind. App., 77.

[3] *See supra*, Chap. VII, Part I, B.

[4] (1808) 1 Taunt., 279.

[5] (1838) 4 M. & W., 245.

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Wimbledon and Putney Commons Conservators v. *Dixon*.

Similarly, it was held in *Wimbledon and Putney Commons Conservators* v. *Dixon*[1] that immemorial user of a way over Wimbledon Common for agricultural purposes did not authorise its use for the purpose of carting building materials to a place on which houses were to be erected.

Bradburn v. *Morris*.

So, too, in *Bradburn* v. *Morris*[2] it was said, following the decision in the last-mentioned case, that evidence of the use of a road for twenty years for purely agricultural purposes was not of itself sufficient to prove a right to use the road for the purpose of getting minerals, no minerals ever having been got on the lands in question.

And the same is the law in India.[3]

System by which purpose effected may be changed.

But as already observed, though the purpose for which the prescriptive right has been gained cannot be changed, yet the system by which such purpose is effected may be changed provided the burthen of the servient tenement is not increased.[4]

Question whether right of way of one kind includes a right of way of another kind.

The statement of the general rule that one kind of right of way does not necessarily include another must be taken with this explanation that the rule is not an absolute prohibition, as the use of the word "necessarily" shews, but is qualified to this extent that, as the user is the recognised indication of the extent of the prescriptive right, evidence of the user of any one kind of way may, if uncontradicted, be sufficient to raise the inference that a right of way of another kind has been acquired. But it is entirely a matter of evidence to be determined in each case upon the particular facts established, and the rule is the same whether the question is as to a right of way of one kind including a right of way of another kind, or a right of way for several purposes being a right of way for general purposes.

Ballard v. *Dyson*.

In *Ballard* v. *Dyson*,[5] the plaintiff claimed a right of

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[1] (1875) 1 Ch. D., 362.

[2] (1876) 3 Ch. D., 812.

[3] *Jadulal Mullick* v. *Gopal Chandra Mukerji* (1886), I. L. R., 13 Cal., 136; L. R., 13 Ind. App., 77; *Jesang* v. *Whittle* (1899), I. L. R., 23 Bom., 595; I. E. Act, s. 28, cl. (*a*), App. VII.

[4] *Jadulal Mullick* v. *Gopal Chandra Mukerji*, *ubi sup*.

[5] (1808) 1 Taunt., 279.

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way for cattle along a narrow passage communicating with a building which at the time of the action was being used as a slaughter-house for oxen.

It was proved that the plaintiff's building had anciently been a barn, but had not been used as such for a great many years, that for many years it had been utilised as a stable, that the plaintiff's predecessor had used it as a slaughter-house for hogs, and that the plaintiff had lately begun to drive fat oxen along the passage in question to the building for the purpose of killing them there.

No other evidence was given of the user of the road for cattle.

The defendant admitted a way for all manner of carriages, and produced no evidence to shew he had ever interrupted the plaintiff in driving his cattle along the passage.

It further appeared that the passage, which was bounded by a row of houses, was so narrow that when carts or carriages were driven through it, passengers could not pass them, but were compelled on account of the limited space to retreat into the houses, and that they would be exposed to considerable danger if they were to meet horned cattle driven through it.

Upon these facts the jury found a verdict for the defendant. A rule *nisi* obtained for a new trial was discharged on the ground that evidence of a prescriptive right of way for all manner of carriages did not necessarily prove a right of way for all manner of cattle.

Chief Justice Mansfield's judgment is important, and it will be useful to quote his own words.

After observing that the authority cited from *Hawkins* only refers to *Co. Litt.*, and that the passage in *Co. Litt.* does not prove that Lord *Coke* was of opinion that in the case of a private way, which must originate in a grant, of which, the grant itself being lost, usage alone indicates the extent, evidence of a limited user could not be received to restrict the usual import of the grant, he proceeds :—

"The general description given by Lord *Coke* does not "seem to touch the question. He refers to *Bracton, lib. 4 fol.*,

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"232, who only says "there are *iter*, *actus*, and *via*"; but says "not a word to explain the meaning of either, or the difference "between them. Nor can I find in any of the books, nor even "in any *nisi prius* case any decision that throws light upon "the subject. A parson has the *via* or *aditus* over a farm "with carts to bring home his tithe, but he can use it for no "other purpose."

"I have always considered it as a matter of evidence, and "a proper question for the jury, to find whether a right of "way for cattle is to be presumed from the usage proved of a "cart-way. Consequently, although in certain cases a general "way for the carriages may be good evidence, from which a jury "may infer a right of this kind, yet it is only evidence; and "they are to compare the reasons which they have for form-"ing an opinion on either side. As well at the trial, as "since, I have thought that there might often be good reasons "why a man should grant a right of carriage-way, and yet "no way for cattle."

"That would be the case where a person who lived next "to a mews in *London*, should let a part of his own stable with "a right of carriage-way to it, which could be used with very "little, if any, inconvenience to himself; yet there it would be "a monstrous inference to conclude that, if a butcher could "establish a slaughter-house at the inner end of the mews "without being indictable for a nuisance, he might therefore "drive horned cattle to it, which would be an intolerable "annoyance to the grantor."

"So cases may exist of a grant of land, where, from the "nature of the premises, permission must be given to drive "a cart to bring corn or the like, and that right might be "exercised without any inconvenience to the grantor; but it "does not follow that cattle may be driven there. The in-"convenience in this case is a strong argument against the "probability of the larger grant. . . ."

"I can find no case in which it has been decided that a "carriage-way necessarily implies a drift-way, though it "appears sometimes to have been taken for granted."

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In *Cowling* v. *Higginson* [1] the question at issue was whether a right of way pleaded by the defendant for horses, carts, waggons, and carriages to a farm which the defendant partly occupied included a right of carting coals. The evidence shewed a user of the way for any purpose for which it was wanted, and that it was never interrupted, but it was proved by the plaintiff that no coals had been raised under the farm for the last seventy years. The defendant objected that the issue was whether there was a right of way for horses, carts, and carriages, whilst the plaintiff contended that the defendant by loading his carts with coal instead of agricultural produce had exceeded his rights. The judge at the trial decided this point in favour of the plaintiff. On a rule obtained by the defendant the Court of Exchequer granted a new trial upon the view that without giving any opinion as to the effect of the evidence there was evidence to go to the jury that the defendant had a right to the way for all purposes. *Cowling* v. *Higginson*.

Lord Abinger, C.B., said [2]: "I do not give any opinion "upon the effect of the evidence; but I should certainly say "that it is not a necessary inference of law, that a way for "agricultural purposes is a way for all purposes, but that it is "a question for the jury in each particular case, to be deter-"mined upon the various facts established in each case. If "a way has been used for several purposes there may be "a ground for inferring that there is a right of way for all "purposes, but if the evidence shews a user for one purpose, "or for particular purposes only, an inference of a general "right would hardly be presumed. I wish to say nothing as to "the inference to be drawn by the jury in this particular case. "The question is entirely for them to determine by the facts "submitted to them."

Parke, B., said [3]: "If the way is confined to a particular "purpose, the jury ought not to extend it, but if it is proved "to have been used for a variety of purposes, then they might

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[1] (1838) 4 M. & W., 250.
[2] *Ubi sup.* at p. 255.
[3] *Ubi sup.* at p. 256.

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"be warranted in finding a way for all. You must generalise "to some extent, and whether in the present case to the extent "of establishing a right for agricultural purposes only, is "a question for the jury."

If a road leads through a park it may reasonably be inferred that the right is to be limited, but if it went over a common it might be a way for all purposes. Using a road as a foot-path would not be proof of a general right; nor would the user of a road for going to church only.[1] Proof of a larger right of way would apparently include a smaller. Thus proof of a carriage-way would establish a horse-way or foot-way.[2]

Extent of prescriptive way limited by user of dominant tenement.

Wimbledon and Putney Conservators v. Dixon, Williams v. James.

But the extent of a right of way cannot be carried beyond the purposes connected with the occupation of the land in its existing state, nor is it supposed that Baron Parke in his judgment in *Cowling* v. *Higginson*[3] intended to decide more than this, and his judgment is so explained in *Wimbledon and Putney Commons Conservators* v. *Dixon*,[4] by Mellish, L.J., who states the true rule to be as expressed by Lord Chief Justice Bovill in *Williams* v. *James*,[5] that when a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which the land might be applied at the time of the supposed grant.

Cowling v. *Higginson*.

In *Cowling* v. *Higginson*, Lord Abinger is careful to say,[6] "if "a way has been used for several purposes, there may be a "ground for inferring that there is a right of way for all "purposes; but if the evidence shews a user for one purpose, "or for particular purposes only, an inference of a general "right would hardly be presumed."

If a way has been used only for purposes connected with the occupation of the land in its existing state, that may be

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[1] *See per* Lord Abinger, C.B., in *Cowling* v. *Higginson* (1878), 4 M. & W. at p. 252.

[2] *See* Gale on Easements, 8th Ed., p. 253.

[3] *Ubi sup.*

[4] (1875) 1 Ch. D. at pp. 370, 371.

[5] (1867) L. R., 2 C. P., 577.

[6] *Ubi sup.* at p. 256.

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considered to be a user for particular purposes, and Mellish, L.J., doubted whether Baron Parke really intended the contrary, for if the facts in *Cowling* v. *Higginson* are looked at, it will be found that the mines had been opened, and therefore, though they had not been worked for seventy years, it was a property with existing mines in it. The way, it is true, had not been used for those mines, but as the property was a property within which there were opened mines, it might fairly be inferred that the right extended to using the road for the purposes of the mines, the working them being a reasonable use of the land in the condition in which it was.

Wimbledon and Putney Commons Conservators v. Dixon.

This rule was applied by the Appeal Court in *Wimbledon and Putney Commons Conservators* v. *Dixon*,[1] where it was decided that user of a way by the defendant during the prescriptive period for agricultural purposes and other purposes connected with the dominant tenement used as a farm, did not give him the right to use the way for carting the materials required for building a number of new houses on the dominant tenement, which was clearly not an ordinary or reasonable use of the land in the condition it was at the time of the acquisition of the right of way.

Desai Bhaoorai v. Desai Chunilal.

To the same effect is the recent decision of the Bombay High Court in *Desai Bhaoorai* v. *Desai Chunilal*,[2] where the facts were similar.

The way in question had, until a recent date before suit, been used for purely agricultural purposes.

The defendants then converted their dominant tenement into a timber-yard, and the question was whether they were entitled to use the way for this new purpose.

It was held that they could not as they were limited to a reasonable use of the way for the purpose of the land in the condition it was when the acquisition of the right took place.

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[1] (1875) 1 Ch. D., 362.

[2] (1899) I. L. R., 24 Bom., 188.

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Special cases in India as to extent of way for general purposes.

In India, it has been held that user of a way for general purposes includes the right to pass along with marriage and funeral processions, unless it can be shewn that the user has been so restricted as to exclude such processions.[1] But evidence that such processions have not been held during the prescriptive period is not of itself sufficient to exclude the right.[2]

And the right to use a passage, as incident to a house, has been held to ordinarily include a right to use it for all ordinary household purposes, for the passage of mehters amongst the rest.[3]

But such a way is not to be used as a place, either for the deposit of night-soil, or into which the privies of the dominant tenement can be cleaned direct, for such a user is clearly wrongful and is liable to be restrained.[4]

Way of common occupation.

Where a private road is bounded on one side by the property of one landowner and on the other side by the property of another there is a *primâ facie* presumption that the boundary between the two properties is the *medium filum* of the road, and, if in this state of things each landowner gives up his portion of the road in order that there may be a road for the common advantage, it appears that the road might then become one for all purposes, for the use of the whole road could not be restricted.

A greater burthen would not be imposed on the servient tenement, because each tenement is in that point of view as much a dominant tenement as the other, and they would mutually get the advantage of having the right of way and using it for all purposes.[5]

Repetition of act of user must be reasonable.

When the act of user if sufficiently repeated would become excessive and there is nothing in the prescriptive user to

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[1] *Raj Manick Singh* v. *Rattun Manick Bose* (1871), 15 W. R., 46; *Lokenath Gossamee* v. *Manmohun Gossamee* (1873), 20 W. R., 293.

[2] *Ibid.*

[3] *Chunder Coomar Mookerji* v. *Koylash Chunder Sett* (1881) I. L. R., 7 Cal., 665 (674).

[4] *Chunder Coomar Mookerji* v. *Koylash Chunder Sett*, *ubi sup.*

[5] *See per* Mellish, L.J., in *Bradburn* v. *Morris* (1876), 3 Ch. D. at p. 823.

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assign definite limits to the exercise of the easement in this respect, the user must be reasonable.

Thus, where a right of way was acquired for the purpose of cleansing the privies of the dominant tenement and there was nothing in the proved facts to indicate a limit to the user of the way in this respect, it was held that the dominant owner might use the way at reasonable and convenient times for giving access to the sweepers who came to cleanse the privies.[1]

Difference between a prescriptive private way and a public way in manner of enjoyment.

Unlike a public right of way a prescriptive private right of way does not entitle the dominant owner to the use of the whole width of the road unless it is necessary for the purposes of the easement.[2]

Where the road is of a particular width and the easement can conveniently and reasonably be exercised within a lesser width, the servient owner is at liberty to restrict the extent of the user accordingly.[3] On the same principle where a way is granted either as a foot-way or a carriage-way, part must be set out for a foot-way and part for a carriage-way.[4]

The same principle has been applied in India to the analogous right of passage for boats in the rainy season over another man's land, and it has been held that the servient owner is at liberty to narrow the channel so long as he does not prevent the dominant owner from passing and repassing as conveniently as formerly.[5]

Nor can a dominant owner complain of the projection of a verandah over the road which is the subject of his right

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[1] *Jadulal Mullick* v. *Gopal Chandra Mukerji* (1886), I. L. R., 13 Cal., 136; L. R., 13 Ind. App., 77.

[2] *See* the cases cited in the next note. And the same rule applies to all easements of way, *see infra*, Part III, under "General negative obligation of servient owner." As to a public way, *see supra*, p. 234.

[3] *Hutton* v. *Hamboro* (1860), 2 F. & F., 218; *Clifford* v. *Hoare* (1874), L. R., 9 C. P., 362; *Toolseemony Dabee* v. *Jogesh Chunder Shaha* (1877), 1 Cal. L. R., 425; *Doorga Churn Dhur* v. *Kally Coomar Sen* (1881), I. L. R., 7 Cal., 145. *See* this subject further considered in Part III in connection with the obligation of the servient owner not to interfere with the full enjoyment of the easement.

[4] *Clifford* v. *Hoare*, *ubi sup.*

[5] *Doorga Churn Dhur* v. *Kally Coomar Sen*, *ubi sup.*

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of way, so long as the reasonable exercise of his right is not interfered with.[1]

Again, a public road may be entered at different places along its length whilst a private road must always be entered at its usual and accustomed place, the reason being that a private way is used for a particular purpose and the party claiming it must shew that it was used for such purpose.[2]

Direction of private way.

A private right of way is not the right to wander at pleasure over a neighbour's land, but a right which is restricted within certain physical limits whereby the points of departure and arrival and the direction must be ascertained and fixed.

Termini.

These points of departure and arrival have been called the terminus *a quo* and the terminus *ad quem*, and it may be shortly stated that a right of way is a right of passage over a particular line from a terminus *a quo* to a terminus *ad quem*, which are fixed.[3] As a rule the party seeking to establish a right of way must prove the particular line between the termini over which he claims the right.[4]

Wimbledon and Putney Commons Conservators v. *Dixon.*

But if the way is over a common where a road in an absolutely direct line between the termini is often impossible, the fact of the track which is used going in a varying line does not prevent the acquisition of the right. As was said by Mellish, L.J., in *Wimbledon and Putney Commons Conservators* v. *Dixon*[5]: "No doubt if a person has land bordering on a "common, and it is proved that he went on the common at "any place where his land might happen to adjoin it, some-"times in one place and sometimes in another, and then went

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[1] *Toolseemony Dabee* v. *Jogesh Chunder Shaha*, *ubi sup.*

[2] *Rouse* v. *Bardin* (1790), 1 Black. Rep., 351 (355); *Woodyer* v. *Hadden* (1813), 5 Taunt. at p. 132; *Hutton* v. *Hamboro* (1850), 2 F. & F., 218.

[3] *Albon* v. *Dremsall* (1610), 1 Browne, 216; *Rouse* v. *Bardin* (1790), 1 Black. Rep., 351; *Woodyer* v. *Hadden*, *ubi sup.*; *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty* (1865), 4 W. R., 49; S. C. *sub nom.* *Tarinee Churn Chuckerbutty* v. *Tarinee Chunder Chuckerbutty*, 1 Ind. Jur. N. S., 6; *Radhanath* v. *Baidonath* (1869), 3 B. L. R. (App.), 118.

[4] *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty*; *Radhanath* v. *Baidonath*, *ubi sup.*; *Doorga Churn Dhur* v. *Kally Coomar Sen* (1881), I. L. R., 7 Cal., 145.

[5] (1875) 1 Ch. D. at p. 359.

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"over the common sometimes to one place and sometimes to "another, it would be difficult from that to infer any right "of way. But if you can find the terminus *a quo* and the "*terminus ad quem*, the mere fact that the owner does not go "precisely in the same track for the purpose of going from "one place to the other, would not enable the owner of the "servient tenement to dispute the right of road."

But that is a very different thing from propounding the general rule that a particular route is immaterial and that a man may establish any number of different paths between the termini which the servient owner may reduce to one path, provided the convenience of the passers-by and the right of easy passage are not curtailed.[1]

Selection of line of way.

The servient owner has the right to set out the line of way to be followed by the dominant owner, and if he fails to set it out, the dominant owner must take the nearest way he can.[2] He cannot claim the right of passage in a tortuous and indirect course between the termini.[3]

In any case the selection of the road must be such as a person of reasonable and ordinary skill and experience would make, and if the road has to be made it must be made in such a manner as a reasonable and prudent person would adopt if he were making a road over his own land.[4]

In the case of a right of way over a common where the nearest direct way between the termini may not be feasible, if the servient owner wishes to confine the dominant owner to a particular track he must set out a reasonable way, and then the party is not entitled to go out of the way merely because the way is rough and inconvenient.[5]

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[1] *See* Campbell, J.'s, opinion in *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty*. It is obvious that any such rule would impose an excessive and altogether unjust burthen on the servient owner, *see* the decisions in *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty* and *Radhanath* v. *Baidonath*, *ubi sup*.

[2] *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), 1 Ch. D. at p. 370; and *see Hutton* v. *Hamboro*, *ubi sup*.

[3] *Syed Hamid Hossein* v. *Gerrain* (1871), 15 W. R., 496.

[4] *Abson* v. *Fenton* (1823), 1 B. & C., 195.

[5] *Wimbledon and Putney Commons Conservators* v. *Dixon*, *ubi sup*.

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Once selected cannot be varied.

When the line of way has been set out neither the dominant owner,[1] nor the servient owner,[2] has any right to vary it.

Rule of deviation.

It has been held that if a way becomes impassable otherwise than through the act of the servient owner, the dominant owner may not deviate from it on to other roads belonging to the servient owner, for by the common law he who has the use of a way is bound to repair it.[3]

But if the dominant owner be wrongfully obstructed by the servient owner in the exercise of the way he may deviate from the original line of way, provided the deviation goes no further than what is reasonably required for the use of the way.

Hawkins v. *Carbines.*

Thus, in *Hawkins* v. *Carbines*,[4] where the defendant had a right of way through the plaintiff's gateway to the premises demised to the defendant, consisting of a large shed, and the defendant's carts had been used to come through the gateway, load and unload and turn round and go out again, and the plaintiff had so altered his premises that the defendant's carts could no longer turn round after unloading in the gateway without coming a little way into the premises and breaking a chain at the end of the gateway, it was held that this was a reasonable use of the way by reason of the wrongful alteration of the plaintiff's premises.

Selby v. *Nettlefold.*

In *Selby* v. *Nettlefold*[5] Lord Chancellor Selborne said: "It is admitted that if *A* grants a right of way to *B* over "his field, and then places across the way an obstruction not

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[1] *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty* (1865), 4 W. R., 49; S. C. *sub nom. Tarinee Churn Chuckerbutty* v. *Tarinee Churn Chuckerbutty*, 1 Ind. Jur. N. S., 6; *Radhanath* v. *Baidonath* (1869), 3 B. L. R. (App.), 118.

[2] *Syed Hamid Hossein* v. *Gerrain* (1871), 15 W. R., 496; *Beacon* v. *South Eastern Ry. Co.* (1889), W. N., 79.

[3] *Pomfret* v. *Ricroft* (1681), 1 Saund., 322; Wms. Notes, pp. 559, 560; *Taylor* v. *Whitaker* (1781), 2 Dougl., 745; *Bullard* v. *Harrison* (1815), 4 Maule & Sel., 387. In this respect, a private way differs from a public way, *see* Chap. IV, Part II, A (2). But *query* whether the right of deviation from a public way when it becomes foundrous and impassable is absolute, *see Arnold* v. *Holbrook* (1873), L. R., 8 Q. B., 96 (99).

[4] (1857) 27 L. J. Exch., 44.

[5] (1873) L. R., 9 Ch. App., 111 (114); 43 L. J. Ch., 359 (369).

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'allowing of easy removal, the grantee may go round to "connect the two parts of his way on each side of the obstacle "over the grantor's land without trespass."

The English law in this respect has been followed in the Indian Easements Act.[1]

So long as the obstruction of the original way continues the right of deviation remains, and the grantee is entitled to have the substituted mode of passage protected by the Court without being compelled to proceed against the grantor for the removal of the obstruction, though the longer the grantee acquiesces in the substituted way the more difficult it will be for him to require the original obstruction to be removed.[2]

But the grantor or his assigns may substitute any other convenient line of deviation than that adopted by the grantee.[3]

Notice to a grantor's assigns of a right of way and its obstruction is notice also of the grantee's right of deviation.[4]

(3) *Rights of way created by Statute.*

In England, the provisions contained in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), for the construction of "accommodation works" for the benefit of a landowner whose land is severed by the railway, entitle such landowner to a convenient passage over the railway sufficient to make good, so far as possible, any interruption which the construction of the railway has caused in the working and use of the land, including any alteration or extension of such working or use of the land which could or ought to have been in the contemplation of the parties when the accommodation works were made and were accepted.[5]

The extent of a right of passage across a railway, acquired by a landowner under the provisions of the above-mentioned Act, is to be measured by the use to which the land was being put at the time of its severance by the railway, and not by any

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[1] *See* s. 24, ill. (*d*), App. VII.
[2] *Selby* v. *Nettlefold*, *ubi sup.*
[3] *Ibid.*
[4] *Ibid.*
[5] *Great Western Ry. Co.* v. *Talbot* (1902), 2 Ch., 759.

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future requirements caused by an alteration in the working or use of the land which were not, or could not have been, in the contemplation of the parties at that time.[1]

Part II.—Accessory Easements.

Accessory easements are rights to do all acts reasonably necessary to secure the full and free enjoyment of the principal easement.[2]

They are analogous to easements of necessity, are recognised upon the same principle, arise in the same manner, by presumption of law, and, like easements of necessity, can be incident either to a reservation or a grant.

It is justice and good reason and an undoubted principle of law that when a man has an easement granted to him he should have the right to do all such acts as are necessary to make the grant effective.[3]

Instances of, in connection with different kinds of easements.

Thus, where a man has been granted a right of way, or a right to carry water in pipes over his neighbour's land, the law gives him the accessory right to enter on the land of the grantor for the purpose of making the way or laying the pipes, if that be necessary, and of keeping them in repair when made or laid.[4]

So, if the dominant owner has a right of support for his house from the servient owner's wall and the wall requires repairing or rebuilding, the dominant owner may enter on the servient tenement for such purpose.[5]

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[1] *Ibid.*

[2] *See* Gale on Easements, 8th Ed., pp. 492 *et seq.*

[3] *Newcomen* v. *Coulson* (1877), 5 Ch. D., 133 (143); *Taylor* v. *Corporation of St. Helens* (1877), 6 Ch. D., 264 (275).

[4] *Pomfret* v. *Ricroft* (1681), 1 Saund., 223; Wms. Notes, pp. 565 *et seq.*; *Celebeck* v. *Girdlers Co.* (1876), 1 Q. B. D. at p. 243; 45 L. J. Q. B. at p. 230; *Newcomen* v. *Coulson, ubi sup.*; *Goodhart* v. *Hyett* (1883), 25 Ch. D., 182; *Jones* v. *Pritchard* (1908), 1 Ch. at p. 638; 24 Times L. R. at p. 311; I. E. Act, s. 24, ills. (*a*) and (*c*), App VII.

[5] *Pomfret* v. *Ricroft, ubi sup.*; *Celebeck* v. *Girdlers Co., ubi sup.*; I. E. Act, s. 24, ill. (*f*), App. VII. The same accessory easement would be acquired by the respective owners of the divided moieties of a party-wall, *Jones* v. *Pritchard, ubi sup.*

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Similarly, where a dominant owner had the easement of a drain, and the sewer with which the drain communicated was altered by the public authority, it was held that the former had a right to go on the servient tenement and alter the drain so as to adapt it to the new sewer.[1]

A right to the flow of water through an artificial channel in the servient tenement carries with it the incidental or accessory right on the part of the dominant owner to cleanse such watercourse.[2]

But a right to go on a neighbour's land to pick the fruit of overhanging trees is not accessory to the right to have such trees overhanging. It is a distinct right.[3]

A further illustration of accessory easements is to be found in the case of mining operations, where the person who has the right to win the minerals is also entitled to do all such acts on the servient tenement as are necessary for such purpose.

Thus in *Senhouse* v. *Christian*[4] the grant of a right of way to carry coals was held to include the right to make any such way as was necessary for that purpose. *Senhouse* v. *Christian.*

In *Dand* v. *Kingscote*,[5] where the right of getting coals together with *sufficient* way-leave and stay-leave connected therewith was reserved in a grant of lands, it was held that the object of the reservation being to get coals *beneficially* to the owner of them, there passed by it a right to such a description of way-leave and in such a direction as would be reasonably sufficient to enable the coal owner to get the coal from time to time to a reasonable profit. *Dand* v. *Kingscote.*

In such cases the accessory right is practically inseparable from the principal right, and in this respect may be regarded

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[1] *Finlinson* v. *Porter* (1875), L. R., 10 Q. B., 188; I. E. Act, s. 24, ill. (*b*), App. VII.

[2] *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (1878), L. R., 4 App. Cas. at p. 133; I. L. R., 4 Cal., at p. 644.

[3] *Naik Parshotam Ghela* v. *Gandrap Fatelal Gokuldas* (1892), I. L. R., 17 Bom., 745. But, as already seen, the right to have trees overhanging a neighbour's land is not a right which can be acquired by prescription, *see* Chap. IV, Part II, C (3).

[4] (1787) 1 T. R., 560; 1 R. R., 300.

[5] (1840) 6 M. & W., 174.

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as an easement of necessity, in which character it has already been considered.[1]

A right of way along a bank for the purpose of fishing in a river can exist as appendant to a right of fishery.[2]

The grantee of a right of way has the accessory right to enter on the servient tenement not only for the purpose of repairing the way, as already remarked, but of making it, if necessary.

Thus, the grantee of a carriage-way may make a way sufficient to support the ordinary traffic of a carriage-way.[3]

Exercise of accessory right must be reasonable.

The means adopted by the dominant owner for making the grant of the easement effective must be reasonable so as to cause no unnecessary damage to the servient tenement.[4]

Thus, if a man has the accessory right of making a road over his neighbour's land, he must make it in such a manner as a prudent and rational person would if he were making a road over his own land.[5]

Similarly, it was held that where a dominant owner was entitled to have the roof of his house projecting over the servient tenement, his right to go on to the servient tenement for the purpose of repairing the same would be reasonably satisfied once in every year between the hours of 9 A.M. and 5 P.M., after one month's notice to the servient owner.[6]

Damage caused must be repaired.

The dominant owner is bound to repair, so far as is practicable, any damage caused to the servient owner by the exercise of the accessory easement.[7]

Disturbance of accessory easements.

An accessory easement is as much the subject of protection by the Court as a principal easement, and the relief granted for the disturbance thereof proceeds upon the same principles.

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[1] *See* Chap. I, Part I, and Chap. VI, Part IV, A.

[2] *Hanbury* v. *Jenkins* (1901), 2 Ch., 401.

[3] *Newcomen* v. *Coulson* (1877), 5 Ch. D., 133 (143).

[4] *Abson* v. *Fenton* (1823), 1 B. & C., 195; *Dand* v. *Kingscote* (1840), 6 M. & W., 174; *Taylor* v. *Corporation of St. Helens* (1877), 6 Ch. D. at p. 274; I. E. Act, s. 24, App. VII.

[5] *Abson* v. *Fenton*, *ubi sup.*

[6] *Hayagreeva* v. *Sami* (1891), I. L. R., 15 Mad., 286.

[7] Gale on Easements, 8th Ed., p. 496, I. E. Act, s. 24, App. VII.

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Thus, in *Goodhart* v. *Hyett*[1] it appeared that the defendant had begun to build a house over the line of pipes through which the plaintiff had an easement for the supply of water to his house and grounds, and the Court being of opinion that the result of such building, if completed, would largely increase the difficulty and expense to which the plaintiff was put in repairing the pipes, granted an injunction restraining the defendant from so building. *Goodhart* v. *Hyett*.

Part III.—Obligations connected with the Enjoyment and Preservation of Easements.

As a general rule it lies on the dominant owner to carry out all repairs and do all acts on the servient tenement necessary for the use and preservation of his easement and to bear the expense of so doing.[2] General liability of dominant owner.

To this end he has the right, already considered in connection with accessory easements, to go on to the servient tenement.[3]

In *Pomfret* v. *Ricroft*[4] Twisden, J., says: "Where I grant "a way over my land, I shall not be bound to repair it"; and in *Taylor* v. *Whitehead*[5] Lord Mansfield said: "By common "law, he who has the use of a thing ought to repair it." *Pomfret* v. *Ricroft*. *Taylor* v. *Whitehead*.

In *Colebeck* v. *Girdlers Co.*,[6] a case of support in which the plaintiff claimed compensation from the defendant on the ground that the latter's failure to keep the supporting tenement in repair had rendered the plaintiff's house uninhabitable, it was determined that assuming the support of the plaintiff's house to be in the nature of an easement, it was well established that there is no obligation to repair on the part of the owner of the servient tenement, but the owner of the dominant *Colebeck* v. *Girdlers Co.*

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[1] (1883) 25 Ch. D., 182.

[2] *Pomfret* v. *Ricroft* (1681), 1 Saund., 322; Wms. Notes, 559, 560; *Taylor* v. *Whitehead* (1781), 2 Dougl., 745; *Colebeck* v. *Girdlers Co.* (1875), 1 Q. B. D., 234; 45 L. J. Q. B., 225; *Jones* v. *Pritchard* (1908), 1 Ch. at p. 638; 24 Times L. R. at p. 311; Gale, 8th Ed., 475, 476; I. E. Act, s. 25, App. VII.

[3] *See supra*, Part II.

[4] *Ubi sup.*

[5] *Ubi sup.* at pp. 748, 749.

[6] (1875) 1 Q. B. D., 234 (243); 45 L. J. Q. B., 225 (230).

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tenement must repair, and that he may enter on the land of the servient owner for that purpose.

The liability of the dominant owner to repair is a necessary corollary to the rule that the servient owner is under no personal or active obligation to do anything for the benefit of the dominant tenement.[1]

Highway Board, etc., of Macclesfield v. Grant.

In *Highway Board, etc., of Macclesfield* v. *Grant*,[2] Lopes, J., said: "As a general rule easements impose no personal "obligation upon the owner of the servient tenement to do "anything, the burden of repair falls upon the owner of the "dominant tenement. There is abundance of authority for "this, and it is in accordance with the principle of the civil "law which imposed the burden of repair in cases of ease-"ments upon the owner of the dominant and not upon the "owner of the servient tenement."

Dominant owner when liable for damage arising from want of repair.

Where the enjoyment of the easement is had by means of some artificial work on the servient tenement, placed there by, and belonging to, the dominant owner, he is liable for any damage arising from its want of repair.[3]

Thus, if the easement be to take water by means of a gutter or pipes across another man's land, and the gutter or pipes are laid by the owner of the dominant tenement and fall into such disrepair that water escapes on to the servient tenement, the owner of the dominant tenement will be liable for any damage done by such water.[4]

To an action against the dominant owner for damage resulting from a failure to repair such artificial work, it is no defence to allege that the damage has been caused by the wrongful act of the tenant in possession, for the defendant might have maintained an action against him in respect thereof.[5]

Nor in such a case is it a good ground of defence that

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[1] *See* case next cited, and *supra*, p. 166.

[2] (1882) 51 L. J. N. S., Q. B., 357.

[3] *Lord Egremont* v. *Pulman* (1829), 1 M. & M., 404; *Bell* v. *Twentyman* (1841), 1 Q. B., 766; *Jones* v. *Pritchard* (1908), 1 Ch. at p. 638; 24 Times L. R. at p. 311; I. E. Act, s. 26, App. VII.

[4] *Lord Egremont* v. *Pulman*; *Bell* v. *Twentyman*; *Jones* v. *Pritchard*, *ubi sup.*

[5] *Lord Egremont* v. *Pulman*, *ubi sup.*

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the defendant promptly repaired as soon as he had notice of the injury, or repaired as soon after the injury as was possible, for the dominant owner is under an obligation to the servient owner to keep in repair, and if he fails to do so, the cause of action arises as soon as the damage is sustained.[1]

But it is only in the case of such artificial work on the servient tenement that the dominant owner is under an active obligation to repair.[2]

Thus, the principle would be inapplicable to a case where the easement consisted in turning water on to the servient tenement at a definite point, such water being carried away by a surface drain belonging to the servient owner, even though, in fact, such drain served no other purpose.[3]

Special liability of servient owner to repair.

Though it is contrary to the general rule that a servient owner should repair, he may be compelled to do so either by tenure, prescription or special agreement, or by virtue of a special local custom.[4]

This rule is now of general application to all easements.

It appears to have been a question at one time whether the owner of the servient tenement was not under an obligation to repair, corresponding to the servitude *oneris ferendi*, in cases of support of one part of a building by another.

Highway Board, etc., of Macclesfield v. Grant.

But in *Highway Board, etc., of Macclesfield* v. *Grant*[5] it was treated as settled law that in the case of such easements in town property, the additional obligation to repair could

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[1] *Bell* v. *Twentyman, ubi sup.*

[2] *I.e.* towards the servient owner. In other cases the dominant owner has only himself to consider and need not repair if he prefers to take the risk of losing his easement, *see Jones* v. *Pritchard, ubi sup.* And even in the case under consideration it was doubted in *Jones* v. *Pritchard, Ibid.*, whether the dominant owner is under any duty to repair, it being thought that the true position is that he cannot in the circumstances mentioned plead the easement in justification of what would otherwise be a trespass, because the easement is not in fact being fairly or properly exercised.

[3] *Jones* v. *Pritchard* (1908), 1 Ch. at p. 639; 24 Times L. R. at p. 311.

[4] *See* Gale, 8th Ed., pp. 477 *et seq.*; Note to *Pomfret* v. *Ricroft*, 1 Saund., 322; Wms. Notes, p. 566; *Highway Board, etc., of Macclesfield* v. *Grant* (1882), 51 L. J. N. S., Q. B., 357; *Jones* v. *Pritchard* (1908), 1 Ch. at p. 637; 24 Times L. R. at p. 310.

[5] (1882) 51 L. J. N. S., Q. B., 357.

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only be imposed on the servient owner by virtue of an express stipulation in the deed of grant or by prescription, and this rule was extended to easements of support outside towns, such as, in this case, the case of a highway supported by a wall.

The liability of the servient owner to repair being contrary to the ordinary incidents of easements requires strong evidence to support it.

Thus, where an easement of support to a highway by a wall had been acquired, it was considered by the court that the fact that the servient owner had on various occasions repaired the wall was not of itself sufficient to impose on him a liability to repair.[1]

General negative obligation of servient owner in reference to easements and profits à prendre.

But apart from such special liability to repair, the nature of the obligation resting on the owner of the servient tenement is purely negative, that is to say, he must not so deal with the servient tenement as to render the easement incapable, or more difficult, of enjoyment by the owner of the dominant tenement.[2]

Consistently with such duty the servient owner may use the servient tenement in any way he pleases.[3] He may, as has been seen, impose subordinate easements upon it, or exercise on it in his own favour any of the ordinary rights of ownership.

To illustrate the general principle, an easement of way does not, as a general rule, entitle the dominant owner to the use of the whole width of the road unless it be necessary for the full and free exercise of the easement, but is confined to such part of the centre of the road as may be necessary for the purposes of the particular right.[4] In this respect, the only obligation resting upon the servient owner is that he shall not unreasonably narrow the width of the road or do anything which practically or substantially

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[1] *Ibid.*

[2] *See Jones* v. *Pritchard* (1908), 1 Ch. at p. 637; 24 Times L. R. at p. 310; and the cases cited in the next three footnotes; I. E. Act, s. 27, App. VII.

[3] *Ibid.*

[4] *Hutton* v. *Hamboro* (1860), 2 F. & F., 218.

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prevents the way from being used as conveniently as before.[1]

Hawkins v. *Carbines*.

In *Hawkins* v. *Carbines*[2] it was considered that the defendants having acquired a right of way through the plaintiff's gateway for the purpose of loading and unloading their cars at a particular place, such right of way could not be limited by the erection of a brick wall by the plaintiff, and that the defendants were accordingly justified in slightly encroaching on the plaintiff's premises to obtain the full enjoyment of their right.

Hutton v. *Hamboro*.

In *Hutton* v. *Hamboro*,[3] where the defendant alleged that the plaintiff by putting up gate-posts had obstructed his right of way, Cockburn, C.J., directed the jury that the question was, whether practically and substantially the right of way could be exercised as conveniently as before, or whether the defendant had really lost anything by the alteration. There was a verdict for the plaintiff.

So long as the owner of the dominant tenement obtains a reasonable enjoyment of his easement, he cannot complain of anything done on the servient tenement.

Clifford v. *Hoare*.

In *Clifford* v. *Hoare*,[4] the plaintiff had been granted a right of way for all purposes with or without carriages along a road forty feet in width.

Across this road a portico had been erected, the bases of the columns of which projected about two feet into the road, and the plaintiff contended that he was entitled to have such projection removed as being an interference with his easement.

The Court decided against the plaintiff. Lord Coleridge, C.J., said[5]: "Now what right or easement did the "plaintiff acquire in reference to that road? A right for "himself and his friends, servants, and workmen to pass

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[1] *Hawkins* v. *Carbines* (1857), 27 L. J. Ch., 44; *Hutton* v. *Hamboro*, *ubi sup.*; *Clifford* v. *Hoare* (1874), L. R. 9 C. P., 362; *Todseemony Dabee* v. *Jogesh Chunder Shaha* (1877), 1 Cal. L. R., 425; *Doorga Churn Dhur* v. *Kally Coomar Sen* (1881), I. L. R., 7 Cal., 145. These general rules may of course be excluded by the terms of the grant, as in *Nicol* v. *Beaumont* (1884), 50 L. T. 112.

[2] *Ubi sup.*

[3] *Ubi sup.*

[4] *Ubi sup.*

[5] *Ibid.* at p. 370.

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"along the roads or intended roads and ways delineated on "the plan. It was pointed out in the course of the argument "that that could not be an absolute grant of every part of "the road for all the purposes mentioned; part must be set "out for a carriage-way and part for a foot-way. What has "the plaintiff got? As far as a carriage-way is concerned, "he has all he bargained for, except that the bases of the "columns supporting the portico incroach a little upon it. "If this had been an absolute conveyance of a forty-foot "road set out by metes and bounds, and a portion of it had "been obstructed by the conveying party, no doubt an action "might have been maintained for that trespass. But that "is not the case; that which is granted is a right of way, "an easement, over a road the soil of which remains in the "grantor. All deeds are to be construed according to the "intention of the parties as expressed therein, and we gather "from the language of this deed that the intention was to "grant the plaintiff an easement only, the reasonable use and "enjoyment of an ascertained way; and it is not suggested "that the plaintiff has not such reasonable enjoyment."

Toolseemony Dabee v. *Jogesh Chunder Shaha.*

The principle laid down in *Clifford* v. *Hoare* has been followed in India in the case of *Toolseemony Dabee* v. *Jogesh Chunder Shaha*,[1] where the plaintiff sued for the removal of a verandah which projected over a street along which she had a right of way to her house.

Kennedy, J., being of opinion that there had been no substantial obstruction of the plaintiff's right of way, dismissed the suit, and it was held on appeal that as the plaintiff had failed to shew that the erection of the verandah was an interference with the reasonable exercise of her right, the suit had been rightly dismissed.

Doorga Churn Dhur v. *Kally Coomar Sen.*

An application of the same principle is to be found in the case of *Doorga Churn Dhur* v. *Kally Coomar Sen*,[2] where it was held that the servient owner was entitled to narrow the channel over which the dominant owner had a prescriptive

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[1] (1878) 1 Cal. L. R., 425.

[2] (1881) I. L. R., 7 Cal., 145.

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right of passage for boats in the rainy season, so long as he did not interfere with the convenient exercise of the easement.[1]

The case of *Bala* v. *Maharu*[2] is another illustration of the same principle. *Bala* v. *Maharu.*

There the lower Appellate Court had ordered the removal of a building recently erected by the defendant on a piece of vacant ground, over which the plaintiff had acquired an easement to discharge the waste water from his drain and the rain-water from the roof of his house. On second appeal the Bombay High Court reversed so much of the lower Appellate Court's decree as directed the removal of the building on the ground that the plaintiff had no right to demand that the defendant's land should be kept open and unbuilt upon, and that the defendants could build on their land as they had done provided that they made necessary arrangements to receive the water from the plaintiff's drain and roof and carry it away.

Similar principles are applicable to the case of profits à prendre.

In *Duke of Sutherland* v. *Heathcote*[3] Lindley, L.J., explains that a profit à prendre is a right to take something off another's land and does not prevent the servient owner from taking the same sort of profit off the same land provided he does not interfere with the actual exercise of the first right, which, in the absence of clear and explicit words in the grant, merely limits, and not excludes, the second right. *Duke of Sutherland* v. *Heathcote.*

Thus, a right to take minerals, which is a profit à prendre, does not prevent the servient owner from working the minerals which the dominant owner is not himself in a position to get.

And, in *Bholanath Nundi* v. *Midnapore Zemindari Co., Ltd.*,[4] where waste lands were found to be subject to an easement of pasturage, it was decided that such a right did not prevent the putni owners from cultivating and improving such waste lands provided sufficient pasturage was left. *Bholanath Nundi* v. *Midnapore Zemindari Co., Ltd.*

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[1] *See* ill. (*b*) to s. 27 of I. E. Act, App. VII.

[2] (1895) I. L. R., 20 Bom., 788.

[3] (1892) 1 Ch., 475.

[4] (1904) I. L. R., 31 Cal., 503; 8 Cal. W. N., 425; L. R., 31 Ind. App., 75.

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CHAPTER IX.

Extinction of Easements.

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Part I.—By Express Release.

As easements may be created by express grant, so easements may be extinguished by express release.[1]

In India writing un necessary.

Since, in India, writing is, apparently, not essential to the valid creation of an easement,[2] it is presumed that writing is not necessary to release an easement, but if the release is in writing and the easement is of the value of one hundred rupees or upwards, the writing must be registered.[3]

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[1] *See* Gale on Easements, 8th Ed., 512; *Kristodhone Mitter* v. *Nandarani Dassee* (1908), I. L. R., 35 Cal., 889. If an easement is expressly released when the dominant tenement is under attachment, the express release is a private alienation within s. 276 of the Civ. Proc. Code of a portion of the property attached, and is accordingly void as against all claims enforceable under the attachment, *Kristodhone Mitter* v. *Nandarani Dassee*, *ubi sup.*

[2] *See supra*, Chap. VI, Part I.

[3] *See* Indian Registration Act, III of 1877, s. 3, "immoveable property," and s. 17 (*b*) and (*c*). In *Kristodhone Mitter* v. *Nandarani Dassee*, *ubi sup.*, the question whether an express release must be by deed was incidentally noticed but not decided, the Court expressing no precise opinion one way or the other.

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In England it is a rule of law that the express release of an easement should be effected by an instrument under seal, but the equitable modification of the rule allows easements to be extinguished by agreement merely.[1]

Power of dominant owner to release.

The dominant owner is at liberty to abandon an easement whenever he pleases, for, as already observed, the servient owner has no right to compel him to continue the easement for his benefit.[2]

The power of the dominant owner to release an easement appurtenant to the dominant tenement is commensurate with his power to alienate the dominant tenement.[3]

Release by co-owner.

Thus, if the dominant owner be a tenant for years he cannot release any easement appurtenant to the dominant tenement for a period longer than the term of his lease. And where there are three co-owners of a house to which an easement is appurtenant, and one of them releases the easement, the release is effectual only as against him and his legal representative.[4]

Release as to part of servient tenement.

Under section 38 (third paragraph) of the Indian Easements Act, an easement may be released as to part only of the servient tenement.[5]

Extinction by virtue of legislative enactment.

Easements may be extinguished by virtue of a legislative enactment.

This mode of extinction has the effect of an express release,[6] and instances of it are to be found in England under the Lands Clauses and Railway Clauses Acts,[7] and in India under the Land Acquisition Acts.[8]

The acquisition of land under these Acts discharges it of

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[1] *See* Gale on Easements, 8th Ed., p. 512.

[2] *Arkwright* v. *Gell* (1839), 5 M. & W., 203; *Wood* v. *Waud* (1849), 3 Exch., 748; *Mason* v. *Shrewsbury and Hereford Ry. Co.* (1871), L. R., 6 Q. B., 578; 40 L. J. Q. B., 293; *Khoorshed Hossein* v. *Telnarain Singh* (1878), 2 Cal. L. R., 141; I. E. Act, s. 50, App. VII, and *supra*, Chap. II and Chap. III, Part III.

[3] *See* I. E. Act, s. 38, para. 2, ill. (*b*), App. VII.

[4] *See* I. E. Act, s. 38, ill. (*a*), App. VII.

[5] *See* App. VII.

[6] Gale, *ubi sup.*

[7] *Ibid.* at p. 514.

[8] *Collector of* 24-*Perganahs* v. *Nobin Chunder Ghose* (1865), 3 W. R., 27; *Taylor* v. *Collector of Purneah* (1887), I. L. R., 14 Cal., 423.

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all easements appurtenant thereto, and the remedy of the dominant owner is not by suit for disturbance of his rights, but for compensation for injurious affection.[1]

But when the disturbance is caused not by the exercise of any power conferred by the Act, but by something done independently of it, an action will lie for disturbance.[2]

Under the provisions of the Bengal Tenancy Act, VIII of 1885, a purchaser may, under certain conditions, annul incumbrances including easements attaching to a holding or tenure sold at an execution-sale and purchased by him.[3]

Easements may also be lost by operation of the law of limitation when the dominant owner fails to bring a suit for the disturbance of his right within the time allowed by the Limitation Act.[4] This matter will be more conveniently considered hereafter in connection with the disturbance of easements.[5]

Part II.—By Presumed Release.

It is interesting to observe that for every method of acquisition of easements there is a corresponding method of extinction.

Express grant has its converse in express release.

As there are circumstances from which the law will presume a grant, so there are circumstances from which it will presume a release.

The easement which arises by presumption of law on a severance of the tenements, is extinguished by presumption of law when those tenements are re-united in the same ownership.

As an easement may be acquired as a matter of necessity, so will it be extinguished when the necessity ceases.

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[1] *Eagle* v. *Charing Cross Ry. Co.* (1867), L. R., 2 C. P., 638; *Wigram* v. *Fryer* (1887), 36 Ch. D., 87; *Taylor* v. *The Collector of Purneah*, *ubi sup.*

[2] *Turner* v. *Sheffield and Rotherham Ry. Co.* (1842), 10 M. & W., 425.

[3] Ss. 161, 163–167.

[4] *Kena Mahomed* v. *Bohatoo Sircar* (1863), 1 Marsh., 506

[5] *See* Chap. XI, Part III (5).

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As user may be evidence of a prescriptive right, so non-user may be evidence of its abandonment.

In dealing with the loss of easements by presumed release it is proposed to examine the subject from four different aspects, namely—

(*a*) Extinction by unity of absolute ownership.
(*b*) Extinction through the authorised act of the servient owner.
(*c*) Extinction by abandonment.
(*d*) Extinction by forfeiture.

A.—Extinction by unity of absolute ownership.

Conditions of.

Easements are extinguished by unity of seisin or the absolute ownership of the dominant and servient tenements becoming vested in the same person.[1]

To this statement it is necessary to add the following reservations :—

(1) That the two tenements held in fee must be for an equally perdurable estate[2]; and

(2) That the unity of seisin must be accompanied by unity of possession and enjoyment.[3]

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[1] 2 Coke's Inst., First Part, s. 561, p. 313*b*; *Wood* v. *Waud* (1849), 3 Exch. at p. 775; *Modhoosoodun Dey* v. *Bissonauth Dey* (1875), 15 B. L. R., 365; *Lord Dynevor* v. *Tennant* (1886), 32 Ch. D., 375; 33 Ch. D., 420; I. E. Act, s. 46, App. VII.

[2] In Coke's Inst., First Part, s. 561, p. 313*b*, Lord Coke quotes Littleton as follows: "But where the tenant hath "as great and as high estate in the tene-"ments as the lord hath in the seignory; "in such case, if the lord grant the "services to the tenant in fee, this shall "enure by way of extinguishment, *causa* "*patet*." Upon which Lord Coke makes the following comment: "Here Little-"ton intendeth not only as great and "high estate, but as perdurable also, as "hath been said; for a disseisor or "tenant in fee upon condition hath as "high and great an estate, but not so "perdurable an estate, as shall make an "extinguishment," *Ibid.*

[3] *Richardson* v. *Graham* (1908), 1 K. B. 39. Thus, where a dominant tenement being under lease, and the lessee having an easement of light, the dominant tenement was conveyed in fee to the freeholder of the servient tenement, it was held, that the easement was not extinguished. *See* also *Ecclesiastical Commissioners* v. *Kino* (1880), 14 Ch. D., 213, where both tenements were vested in an incumbent but for different interests, and it was thought this would not prevent the acquisition of an easement of light. In *Richardson* v. *Graham*, *ubi sup.* at

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The merger of one tenement in the other so as to result in the absolute ownership of both in fee causes the easement to disappear in the ordinary rights of property.[1] Effect of merger.

An easement, once extinguished cannot revive.[2] Thus, if it is to re-appear on a severance of the tenements it must either be created *de novo*, by the use of apt words, as in the case of discontinuous easements,[3] or arise as a new right by implication of law,[4] as in the case of apparent and continuous easements[5] and easements of necessity.[6] No revival of extinguished easement.

But though, as regards the two latter classes of easements, the notion of a revivor may seem more appropriate than that of a new creation to the process which takes place on a severance of tenements, and to the nature of the rights themselves, the more correct view is that of a new creation, founded, as it is, on the legal conception of an easement and the theoretical inconsistency of a revival after extinction.[7]

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p. 41, Lord Alverstone, C.J., commenting on the statements contained in Goddard on Easements, 6th Ed., p. 555, and Gale on Easements, 7th Ed., p. 488, considered that the proposition laid down in Goddard was too general in its terms, and doubted whether the statement in Gale was intended to apply to possession in fact where the landlord has granted a lease of two adjoining tenements, or where the easement is one of necessity. If this case had been decided otherwise, the decision would have been inconsistent with the previous decisions in *Frewen* v. *Phillipps* (1861), 11 C. B. N. S., 449, and *Mitchell* v. *Cantrill* (1887), 37 Ch. D., 56, which establish that unity of seisin does not prevent the acquisition of a prescriptive right to light by one tenant against another tenant of the same landlord, and with the decision in *Simper* v. *Foley* (1862), 2 J. & H., 555, that a prescriptive right to light acquired as between tenant and tenant is not extinguished by a merger of the leasehold interest of the servient tenement in the reversion, and also with the recent decision in *Fear* v. *Morgan* (1906), 2 Ch., 406; (1907), App. Cas., 425, that an indefeasible right to light may be acquired by prescription by one of two lessees of a common landlord not only as against the adjoining lessee, but also as against the common landlord and all succeeding owners of the adjoining tenement (*see Richardson* v. *Graham*, *ubi sup.*, pp. 44, 45, and *see* further Chap. VII, Part I, B.

[1] *Lord Dynecor* v. *Tennant*, *ubi sup.*; Gale on Easements, 8th Ed., p. 516.

[2] *See* Gale on Easements, 8th Ed., p. 517.

[3] *See supra*, Chap. VI, Part III.

[4] *See Phillips* v. *Low* (1892), 1 Ch., 47 (51).

[5] *Ibid.*, and *see* Chap. VI, Part III, and Part IV, B.

[6] *Holmes* v. *Goring* (1824), 2 Bing., 76; and *see* Chap. VI, Part IV, A.

[7] *See Holmes* v. *Goring*, *ubi sup.*

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Easements of necessity governed by same principles as other easements.

Subject to the conditions above stated, easements of necessity are extinguished by unity of absolute ownership as well as other easements.[1] On a severance of the tenements they do not revive, but come into existence as new rights arising out of the necessity of the case. As says Best, C.J., in *Holmes* v. *Goring*[2]: "If I have four fields, and grant away "two of them, over which I have been accustomed to pass, "the law will presume that I reserve a right of way to those "which I retain; but what right? The same as existed "before? No; the old right is extinguished, and the new "way arises out of the necessity of the thing."[3]

Holmes v. *Goring*.

B.—Extinction through the authorised act of the servient owner.

Nature of the license.

Easements are extinguished where the dominant owner authorises an act of a permanent nature to be done on the servient tenement, the necessary consequence of which is to prevent the future enjoyment of the easement.

Winter v. *Brockwell*.

Thus, in *Winter* v. *Brockwell*,[4] where the defendant with the express consent of the plaintiff erected a skylight at his own expense in such a position as to darken the plaintiff's ancient lights, it was held that the plaintiff had no right of action against the defendant.

Liggins v. *Inge*.

In *Liggins* v. *Inge*[5] the Court considered itself bound by the authority of *Winter* v. *Brockwell*, and held that the plaintiff could not maintain an action against the defendants for confining a weir whereby the flow of water to the plaintiff's mill as formerly enjoyed had been diminished, inasmuch as the defendants had erected the said weir under parol license from the plaintiff's father and had incurred expense in so doing.

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[1] *Holmes* v. *Goring* (1824), 2 Bing. at p. 83; and *see Richardson* v. *Graham* (1908), 1 K. B. at p. 41.

[2] (1824) 2 Bing. at p. 83.

[3] But *cf.* second part of second para. of s. 51 of I. E. Act, App. VII.

[4] (1807) 8 East., 308.

[5] (1831) 7 Bing., 682.

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Davis v. *Marshall*,[1] in which the facts were very similar to those in *Winter* v. *Brockwell*, was decided on the same principle. *Davis* v. *Marshall*.

But where ancient apertures have been closed under a definite arrangement between the dominant and servient owners and for valuable consideration, and the servient owner thereupon builds a wall merely as a temporary precaution against the acquisition of an easement of light and air in the future, the old easement must be taken to have been extinguished by express release, and not by an implied release through the authorised act of the servient owner.[2]

Under the general law the license by which the servient owner commits the act of obstruction may be express[3] or presumed from the acquiescence of the dominant owner.[4] Under the general law the license may be express or presumed.

In *Bower* v. *Hill*[5] the defendant had permanently obstructed the defendant's right of way by the erection of a bridge with a tunnel under it, and Tindal, C.J., said: "We "think the erection of the tunnel is in the nature of, and until "removed, is to be considered as, a permanent obstruction of "the plaintiff's right, and therefore an injury to the plaintiff, "even though he receives no immediate damage thereby. The "right of the plaintiff to this way is injured if there is an "obstruction in its nature permanent. If acquiesced in for "twenty years, it would become evidence of a renunciation "and abandonment of the right of way."[6] *Bower* v. *Hill*.

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[1] (1861) 7 Jur. N. S., 1247; s. c. *sub nom.* *Davies* v. *Marshall* (1861), 10 C. B. N. S., 697.

[2] *Kristodhone Mitter* v. *Nandarani Dassee* (1908), I. L. R., 35 Cal., 889.

[3] *See* the cases above cited.

[4] *See* the cases below cited.

[5] (1835) 1 Scott, 526 (534); 1 Bing. N. C., 549 (555).

[6] But it is not to be supposed that it was here intended impliedly to lay down either as a rule of law, or even as a conclusive presumption of fact, that no interruption for a shorter period than twenty years would destroy the right. It seems clear that the learned judge in dealing with non-user by the plaintiff in conjunction with the adverse act of the defendant did not intend to prescribe a fixed period of time as the condition of an effectual abandonment, but was merely affirming the principle clearly established in later cases that the duration of the non-user is only material as an element in the question of intention to abandon, and is not a circumstance from which alone abandonment can be presumed, *see Reg.* v. *Chorley* (1848), 12 Q. B., 515; 76 R. R., 330; *Ward* v. *Ward* (1852), 7 Exch., 838 (839); and *infra* under "Abandonment of affirmative or discontinuous easements."

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Kena Mahomed v. Bohatoo Sircar.

In *Kena Mahomed* v. *Bohatoo Sircar*[1] the plaintiff and defendant were owners of adjoining estates, and the plaintiff claiming the right of having the drainage water from the defendant's land flow over his own land, sued the defendant for having eight years prior to suit diverted the water so that it no longer flowed over his land. It was held that the mere interruption would not extinguish the right, but that if it were found that the plaintiff had acquiesced in the interruption for eight years, such conduct on his part would be evidence of an intention not to resume the right.

Banee Madhub Doss v. *Ram Joy Rokh.*

In *Banee Madhub Doss* v. *Ram Joy Rokh*[2] it was held that the plaintiff's claim for the demolition of the defendant's house, which obstructed the plaintiff's right of way, was such as a Corrt of Equity and good conscience ought not to enforce on the ground that the defendant had incurred expense in erecting the house and had used it for the convenience and comfort of himself and his family for seven years without opposition from the plaintiff.

Ponnusawmi Tevar v. *The Collector of Madura.*

In *Ponnusawmi Tevar* v. *The Collector of Madura*[3] it was observed that "acquiescence in the sense of mere submission "to the interruption of the enjoyment does not destroy or "impair an easement. To be effectual for that purpose it "must be attributable to an intention on the part of the "owner of the dominant tenement to abandon the benefit "before enjoyed and not merely to a temporary suspension of "the enjoyment, or be evidenced by acts or words which had "induced the owner of the servient tenement to incur expense "on the reasonable belief that the enjoyment had been entirely "relinquished."

Under I. E. Act the license must be express.

The Indian Easements Act does not follow the general law so far as to permit the authority given by the dominant to the servient owner to be implied. Under section 38, Expl. I (*a*), the authority must be express,[4] and Explanation II to the

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[1] (1863) 1 Marsh., 506, and see *Roy Luchmee Pershad* v. *Mt. Fazeelutoonissa Bibi* (1867), 7 W. R., 367.

[2] (1868) 10 W. R., 316; 1 B. L. R. (A. C. J.), 213.

[3] (1869) 5 Mad. H. C., 6 (23).

[4] *See* App. VII.

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same section provides that mere non-user of an easement is not an implied release within the meaning of the section.[1]

Express license may be oral.

Under the general law,[2] and, apparently, also under the Indian Easements Act,[3] the express authority may be oral.

License irrevocable unless limited in duration or power of revocation expressly reserved.

In all such cases of a license to do something on the licensee's land of a permanent and continuing nature, the license, if acted upon at considerable cost to the licensee, cannot be countermanded unless the licensor at the time of granting the license expressly reserves a power of revocation or limits the license as to duration.[4]

C.—Extinction by abandonment.

It is thought desirable to treat separately the cognate subjects of abandonment and forfeiture, for although in each case, so far as negative easements are concerned, the loss of the easement depends upon some permanent alteration of the dominant tenement, yet abandonment is always a question of the dominant owner's intention, whilst forfeiture is itself the legal consequence of an excessive and unauthorised user.

In relation to abandonment it will be found convenient first to state general principles, and then to consider the different classes of easements in relation thereto.

1. Abandonment of Negative or Continuous Easements.

(a) Generally.

In order that a negative easement may be extinguished by abandonment there must be a permanent alteration of the

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[1] *Ibid.* But under the Act non-user or cessation of enjoyment of an easement as such for twenty years (*i.e.* for the same period as is required to gain the easement) will cause its extinction, *see* s. 47, App. VII, and *see infra*, under C, I (*a*), this provision considered in connection with the general law.

[2] *Winter* v. *Brockwell* (1807), 8 East., 308; *Liggins* v. *Inge* (1831), 7 Bing., 682; *Muddun Gopal Mukerji* v. *Nilmonee Banerjee* (1869), 11 W. R., 304; and *see Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98.

[3] *See* s. 38, Expl. I (*a*), App. VII.

[4] *Liggins* v. *Inge*, *ubi sup.* at p. 694; and *see* I. E. Act, s. 60 (*b*), App. VII.

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dominant tenement of such a nature as to shew an intention on the part of the dominant owner to discontinue the enjoyment of the right.[1]

Abandonment, a question of intention.

The question of abandonment is really one of intention in each case,[2] and it is now settled that it is not a condition precedent to an effectual abandonment, (as appears at one time to have been suggested[3]), that it should have been communicated to, and acted upon, by the adjoining owner.[4]

Any circumstances shewing a clear intention to abandon will remit the owner of the servient tenement to the unrestricted use of his own premises.[5]

Non-user, an element of intention.

Into such question of abandonment non-user may enter as an accompanying element of intention, but it is not of itself a circumstance from which abandonment will be presumed.[6] The sufficiency of the period of non-user in any particular case must depend on all the accompanying circumstances indicative of intention, such as the nature of the act done by the grantee of the easement or of the adverse act acquiesced in by him.[7]

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[1] *Lawrence* v. *Obee* (1814), 3 Camp., 514; *Moore* v. *Rawson* (1824), 3 B. & C., 332; 27 R. R., 375; *Liggins* v. *Inge* (1831), 7 Bing., 682; *Stokoe* v. *Singers* (1857), 8 E. & B., 31; 25 L. J. Q. B., 257; *Tapling* v. *Jones* (1865), 11 H. L. C. at p. 319; *Angus* v. *Dalton* (1877), 3 Q. B. D. at p. 102; *Ecclesiastical Commissioners* v. *Kino* (1880), 14 Ch. D., 213; *Newson* v. *Pender* (1884), 27 Ch. D., 43; *Scott* v. *Pape* (1886), 31 Ch. D., 554; *Greenwood* v. *Hornsey* (1886), 33 Ch. D., 471; 55 L. T. 135; *Smith* v. *Baxter* (1900), 2 Ch., 138 (142); *Ankerson* v. *Connelly* (1907), 1 Ch., 678; I. E. Act, s. 38, Expl. I (*b*), ill. (*d*), App. VII.

[2] *Ibid.*, and see *Crossley* v. *Lightowler* (1867), L. R., 2 Ch. App. at p. 482; *Ponnusawmi Terar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6 (23).

[3] *See* the *dicta* in *Stokoe* v. *Singers*, *ubi sup.*

[4] *See* the later cases above cited.

[5] *Per* Lord Chelmsford in *Tapling* v. *Jones*, *ubi sup.*

[6] *See Kristodhone Mitter* v. *Nandarani Dassee* (1908), I. L. R., 35 Cal., 889; and the authorities cited in the next footnote, and I. E. Act, s. 38, Expl. II, App. VII.

[7] *Moore* v. *Rawson* (1824), 3 B. & C., 332; 27 R. R., 375; *Liggins* v. *Inge* (1831), 7 Bing., 682 (693); *Reg.* v. *Chorley* (1848), 12 Q. B., 515; 76 R. R., 330; *Ward* v. *Ward* (1852), 7 Exch., 838 (839); *Crossley* v. *Lightowler*, *ubi sup.*; *Ponnusawmi Terar* v. *Collector of Madura*, *ubi sup.*; *Keny Mahomed* v. *Bohatoo Sircar* (1867), 1 Marsh., 506; *Raj Beharee Roy* v. *Tara Pershad Roy* (1873), 20 W. R., 188. These principles are equally applicable to the loss of affirmative easements by abandonment, *see Reg.* v. *Chorley*; *Ward* v. *Ward*, *ubi sup.*, and *infra*.

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Thus, a suspension of actual enjoyment through some act done by the dominant owner for a temporary purpose, whether by agreement or otherwise, will not destroy the easement,[1] nor will a suspension of actual enjoyment caused by the pulling down of the dominant tenement do so if there is a clear intention to preserve the easement in a new building, whether of the same or different character, or to be used for the same or a different purpose, provided the intended alteration in structure or purpose will not throw an increased burthen on the servient tenement.[2]

Temporary suspension of actual enjoyment, effect of.

But an alteration of the dominant tenement followed by a long period of non-user will raise a presumption of abandonment against the dominant owner, and will throw on him the burthen of shewing that he had done something during such period indicating his intention to resume the enjoyment of the right.[3] Similarly, if an alteration of the dominant tenement induces the servient owner to alter his position in the reasonable belief that the dominant owner intended a permanent abandonment, the easement will be lost.[4]

Presumption against dominant owner.

Under the general law it has never been thought desirable to prescribe a fixed period of non-user in relation to abandonment, or, as already seen, to do more than treat non-user as an element in the question of intention to abandon.[5] But by section 47 of the Indian Easements Act,[6] which is, in this respect, an intentional departure from the general law,[7] it is expressly provided that a continuous easement is extinguished by a total cessation of enjoyment for an unbroken period of twenty years, such period to be reckoned from the day on

No fixed period of non-user in relation to abandonment under general law.

Contra, I. E. Act, s. 47.

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[1] *Davis* v. *Morgan* (1825), 4 B. & C., 8; *Liggins* v. *Inge*, *ubi sup.*; *Hale* v. *Oldroyd* (1845), 14 M. & W., 789; 15 L. J. Exch., 4; *Stokoe* v. *Singers*, *ubi sup.* And *see* Gale on Easements, 8th Ed., p. 521; I. E. Act, s. 47 (*a*), App. VII.

[2] *Ecclesiastical Commissioners* v. *Kino* (1880), 14 Ch. D., 213; *Scott* v. *Pape* (1886), 31 Ch. D., 569, 573, 574; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179, 202, 211; and *see* further *infra* under "Extinction by Forfeiture."

[3] *Moore* v. *Rawson*; *Crossley* v. *Lightowler*, *ubi sup.*

[4] *Stokoe* v. *Singers*; *Ponnusawmi Terar* v. *Collector of Madura*, *ubi sup.*; *Scott* v. *Pape*, *ubi sup.* at p. 574.

[5] *See supra.*

[6] *See* App. VII.

[7] *See Gazette* of India (1880), July to Dec., Part V, p. 479.

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which the enjoyment was obstructed by the servient owner or rendered impossible by the dominant owner.

Change in structure and purpose of dominant tenement, effect of.

If the dominant tenement retains its substantial identity, easements appurtenant to it are not treated as abandoned by reason of any change in the internal structure of the building or the use to which it may be put, provided the burthen on the servient tenement is not thereby increased.[1]

Question as to partial abandonment.

The question as to whether a partial abandonment of a negative easement will, or will not, amount to a total abandonment thereof depends on whether after an alteration in the structure or purpose of the dominant tenement the easement is, or may be, or is not, still substantially capable of the same enjoyment. If it is, or may be, so capable, a partial abandonment of ancient lights, or non-user of the full measure of light which the law permits, will not destroy or restrict the easement[2]; if it is not, the maxim "*De minimis non curat lex*" will apply, and the reconstruction of the dominant tenement will be treated as a total abandonment.[3]

Easement once abandoned is abandoned for ever.

Tapling v. *Jones.*

It would appear that when once a dominant owner has evinced a clear intention to relinquish his easement, his right thereto ceases irrespective of any act of the adjoining owner on his own property. In such circumstances, he can neither prevent the adjoining owner from building as he pleases on his own land, nor, *à fortiori*, can he, by restoring the dominant tenement to its original condition, revert to the enjoyment of the easement and compel the other to remove what would before abandonment have been an obstruction.[4] For, as says

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[1] *Luttrel's case* (1738), 4 Rep. 86*a*; *Saunders* v. *Newman* (1818), 1 B. & Ald., 258; *Barnes* v. *Loach* (1879), 4 Q. B. D. at p. 498; *Caspersz* v. *Raj Kumar* (1898), 3 Cal. W. N., 28; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179, 202, 211; *Ankerson* v. *Connelly* (1907), 1 Ch., 678. And *see* further *infra* under "Extinction by Forfeiture."

[2] *Scott* v. *Pape* (1886), 31 Ch. D., 554; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179, 203, 211.

[3] *Ankerson* v. *Connelly* (1907), 1 Ch., 678.

[4] *Moore* v. *Rawson* (1824), 3 B. & C., 332; 27 R. R., 375; *Garritt* v. *Sharp* (1835), 4 Nev. & Man., 834; *Tapling* v. *Jones* (1862), 12 C. B. N. S. at p. 864, *per* Pollock, C.B.; S. C. on appeal (1865), 11 H. L. C. at p. 319, *per* Lord Chelmsford. This principle would appear to be equally applicable to a case of forfeiture by alteration of the dominant tenement, *see* Gale on Easements, 8th Ed., pp. 554, 555.

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Lord Chelmsford in *Tapling* v. *Jones*,[1] "a right once "abandoned is-abandoned for ever."

(b) *Easements of Light and Air.*

Under this heading the leading case is that of *Moore* v. *Rawson*.[2] *Moore* v. *Rawson.*

There the plaintiff's messuage was an ancient house adjoining which there had been a building formerly used as a weaver's shop, and having ancient windows for the admission of light for the purposes of such business.

About seventeen years prior to the action the then owner and occupier of the premises pulled down the old shop and erected on the same site a stable having a blank wall adjoining the defendant's premises.

About three years prior to action, and while the plaintiff's premises continued in this condition, the defendant erected a building next the plaintiff's blank wall, and the plaintiff then opened a window in his blank wall in the same place where there had formerly been a window in the old wall of the weaver's shop, and brought the action for the obstruction of the new window by the defendant's building.

It was held that the pulling down of the old wall with windows and the erection of the new blank wall in its place without windows amounted to an abandonment of the easement, and that the plaintiff was not entitled to maintain the action. The judgments are important, and the following passages may usefully be quoted :—

Abbott, C.J., said[3]: "It seems to me that, if a person "entitled to ancient lights pulls down his house and erects "a blank wall in the place of a wall in which there had been "windows, and suffers that blank wall to remain for a con- "siderable period of time, it lies upon him at least to shew, "that at the time when he so erected the blank wall, and "thus apparently abandoned the windows which gave light

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[1] *Ubi sup.*

[2] (1824) 3 B. & C., 332; 27 R. R., 375.

[3] 3 B. & C. at p. 336; 27 R. R. at pp. 378, 379.

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"and air to the house, that was not a perpetual, but a "temporary abandonment of the enjoyment; and that he "intended to resume the enjoyment of those advantages "within a reasonable period of time. I think the burthen of "shewing that lies on the party who has discontinued the use "of the light. By building the blank wall, he may have "induced another person to become the purchaser of the "adjoining ground for building purposes, and it would be "most unjust that he should afterwards prevent such a "person from carrying those purposes into effect."

Bayley, J., said[1]: "The right to light, air, or water, is "acquired by enjoyment, and will, as it seems to me, continue "so long as the party either continues that enjoyment or "shews an intention to continue it." The same learned judge, after pointing out that, by the erection of the blank wall, the plaintiff's predecessor ceased to enjoy the light in the mode in which he had used to do, and his right ceased with it, continues as follows: "Suppose that instead of doing that" (*i.e.* pulling down the wall), "he had pulled down the house and buildings, "and converted the land into a garden, and continued so to "use it for a period of seventeen years; and another person "had been induced by such conduct to buy the adjoining "ground for the purposes of building. It would be most "unjust to allow the person who had so converted his land "into garden ground, to prevent the other from building upon "the adjoining land which he had, under such circumstances, "been induced to purchase for that purpose. I think that, "according to the doctrine of modern times, we must consider "the enjoyment as giving the right, and that it is a wholesome "and wise qualification of that rule to say, that the ceasing to "enjoy destroys the right, unless at the time when the party "discontinues the enjoyment he does some act to shew that he "means to resume it within a reasonable time."

Holroyd, J.,[2] thought that if the plaintiff's predecessor

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[1] 3 B. & C. at p. 336; 27 R. R. at p. 379.

[2] 3 B. & C. at pp. 337, 338; 27 R. R. at p. 380.

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had intimated, or had done some act shewing, his intention of building a similar wall in the place of the old one, the rights attaching to the latter would have continued, but that the interval of a long period of time between the pulling down of the old wall and the erection of a new though similar one without any intention previously shewn to make a similar use of the land, or the pulling down of the old wall and the substitution of something entirely different in its place, would constitute an abandonment of the easement as being the creation of a new thing. There was not only nothing to shew that he intended to rebuild the old wall within reasonable time, but the actual erection of a new wall different from the old one shewed he did not intend to renovate the old one.

Littledale, J.,[1] thought that as the right to light and air might be acquired by user, so it might be lost by non-user, such non-user being of course the necessary result of the permanent alteration of the dominant tenement.

He could not agree to the proposition that as the right to light and air could only be acquired by occupancy for twenty years, there was a corresponding rule that there could be no loss of the right without abandonment for twenty years.

"I think," he says,[2] "that if a party does any act to shew "that he abandons his right to the benefit of that light and "air which he once had, he may lose his right in a much less "period than twenty years. If a man pulls down a house "and does not make any use of the land for two or three "years, or converts it into tillage, I think he may be taken "to have abandoned all intention of rebuilding the house; "and, consequently, that his right to the light has ceased. "But if he builds upon the same site, and places windows in "the same spot, or does anything to shew he did not mean to "convert the land to a different purpose, then his right would "not cease."

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[1] 3 B. & C. at p. 339; 27 R. R. at p. 381.

[2] 3 B. & C. at p. 341; 27 R. R. at p. 383.

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Stokoe v. *Singers.*

In *Stokoe* v. *Singers*[1] the plaintiffs had blocked up their ancient windows from the inside, leaving on the outside the bars with which the windows had been secured, so that it was obvious there had been windows there. The windows remained in this state for nineteen years, when the defendant shewed an intention to build in such a way as would have prevented the windows from being ever reopened. To assert their easement the plaintiffs reopened the windows, and the defendant, in order to raise the question whether they had such right, and before the expiration of twenty years after the first blocking up of the windows, erected a board on his own land so as to obstruct the windows. The plaintiffs then brought an action for the obstruction. Baron Martin at the trial directed the jury that the easement might be lost by an abandonment, and that closing the windows with the intention of never opening them again would be an abandonment destroying the right, but that closing them for a mere temporary purpose would not be so. He also stated that, though the person entitled to the right might not really have abandoned it, yet, if he manifested such an appearance of having abandoned it as to induce the adjoining proprietor to alter his position in the reasonable belief the right was abandoned, he would be precluded from claiming the right. The jury found for the plaintiffs. In discharging the rule for a new trial on the ground of misdirection, the Court of Queen's Bench thought the true points were left by the judge to the jury and found for the plaintiffs. They considered the jury to have found that the plaintiffs' predecessor did not so close up his light as to lead the defendant to incur expense or loss on the reasonable belief that they had been permanently abandoned, nor so as to manifest an intention of permanently abandoning them.

When abandonment may become effectual.

Stokoe v. *Singers* did not actually decide what would be the effect of closing up lights in such a manner as to shew an intention of permanently abandoning them when such

[1] (1857) 8 E. & B., 31; 26 L. J. Q. B., 257.

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intention had not been communicated to the adjoining owner and not acted upon by him, but from the reported *dicta* in the case, it appears to have been questioned whether the abandonment would become effectual until it had been communicated to, and acted upon, by the adjoining owner.

But the later cases shew that this question ceases to be material when once the intention on the part of the dominant owner to permanently abandon his right has been clearly manifested.

Thus, the material question in each case is the question of intention, and, if that be established against the dominant owner, the shortest period of non-user will not prevent extinction [1]; on the other hand, if it be not, even a long period of non-user *will not*, under the general law, avail to destroy the right.[2]

Tapling v. *Jones*.

In *Tapling* v. *Jones* [3] Lord Chelmsford said: "The right "continues uninterruptedly until some unequivocal act of "intentional abandonment is done by the person who has "acquired it, which will remit the adjoining owner to the "unrestricted use of his own premises. It will, of course, be "a question in each case, whether the circumstances satis- "factorily establish an intention to abandon altogether the "future enjoyment and exercise of the right. If such an "intention is clearly manifested, the adjoining owner may "build as he pleases on his own land."

National Provincial Plate Glass Insurance Co. v. *Prudential Assurance Co.*

In *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* [4] Fry, J., expressed the opinion that the setting back of an ancient window in a parallel plane or at an angle with the original plane would not destroy an easement of light.

Barnes v. *Loach*.

In *Barnes* v. *Loach* [5] it was held that where there was a right to the access of light and air to windows in the walls of certain cottages, the easement was not destroyed by the setting

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[1] *Moore* v. *Rawson*, *ubi sup.*

[2] *Stokoe* v. *Singers*, *ubi sup.* As to the law under the I. E. Act, *see* s. 47, App. VII, and *supra*, under C, I (*a*).

[3] (1865) 11 H. L. C., at p. 319.

[4] (1877) 6 Ch. D., 757 (767).

[5] (1879) 4 Q. B. D., 491.

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back of the walls and the opening in the walls so set back of new windows of the same size, and in the same relative position, as the former windows in the former walls.

It should be observed that the effect of setting back the walls was to lessen rather than to increase the burthen on the servient tenement, and that the case was strongly within the principle that an easement is not destroyed by an alteration in the dominant tenement or in the mode of user whereby neither the tenement is deprived of its substantial identity, nor the burthen on the servient is materially increased.[1]

Ecclesiastical Commissioners v. *Kino*

Ecclesiastical Commissioners v. *Kino*[2] decides that a suspension of actual enjoyment caused by the pulling down of the dominant building will not amount to an abandonment of ancient lights if there is a clear intention to restore the building with its ancient lights.[3] James, L.J., says: "It "appears to me that when a building, in which there are "ancient lights, has been taken down, though the actual "enjoyment of the right has been suspended, there is nothing "to prevent the owner from applying to the Court for an "injunction to restrain an erection which would interfere with "the easement of the ancient lights, where the Court is "satisfied, that he is about to restore the building with its "ancient lights."

"That was so decided by Lord Justice Giffard in *Staight* v. "*Burn*,[4] which unfortunately was not brought to the attention "of the Vice-Chancellor. I cannot see any distinction between "that case and this. There the house was taken down and "a wall was left standing with holes in it. Here the church "has been taken down, and the fact that no wall has been left "standing with holes in it, does not, in my opinion, make any "substantial difference, because there is no doubt that the

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[1] *See supra*, C, I (*a*), "Generally," and *infra*, under D, I.

[2] (1880) 14 Ch. D., 213.

[3] Nor would the existence of the easement be affected by any intended change in the character or purpose of the dominant building when restored, provided the substantial identity of the building will remain and the burthen on the servient tenement will not be increased, *Ibid.*; *Scott* v. *Pape* (1886), 31 Ch. D., 569, 573, 574, and *see supra*.

[4] (1869) L. R., 5 Ch. App., 163.

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"property, which is in the city of London; will be sold for the "purpose of being built on, and there is very little doubt that, "so far as possible, the purchaser from the Ecclesiastical "Commissioners will take care to preserve the rights of light."

In *Newson* v. *Pender*,[1] the plaintiffs were the owners of a house containing ancient windows. This house they pulled down and in its place erected a much larger building. A few of the new windows were in substantially the same positions as the old windows though covering a larger space, but the greater number of the new windows occupied only partially the spaces formerly occupied by the old windows and extended beyond them on one side or the other. Some of the new windows were in entirely different positions from any of the old ones, and some of the old windows had been bricked up.

At the time of erecting the new buildings a careful record was made of the exact position occupied by all the ancient lights before the alteration and of the relative positions of the new windows.[2]

On a motion for an interim injunction it was held that the plaintiffs had shewn an intention to preserve, and not to abandon, their ancient lights, and that they were entitled to an injunction restraining the defendants from raising their building so as to obstruct or interfere with the plaintiffs' lights.

In *Scott* v. *Pape*[3] the plaintiff pulled down a building in which were ancient lights, and on its site erected a new building with larger and more numerous windows. *Scott v. Pape.*

In the new building the area of some of the old windows was entirely occupied by a brick wall, but it was found, as a fact, that six of the new windows coincided substantially with three of the old windows. It was held that, as regards the first set of windows, the erection of the brick wall unquestionably shewed an intention on the part of the plaintiff to abandon

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[1] (1884) 27 Ch. D., 43.

[2] As to the admissibility of such evidence, *see Smith* v. *Baxter* (1900), 2 Ch., 138, 141, 142.

[3] (1886) 31 Ch. D., 554.

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the use and enjoyment of the light formerly had in respect of them, but that there had been no intention to abandon the easement in respect of the second set of windows and that the plaintiff was entitled to protection accordingly.[1]

Greenwood v. Hornsey.

In *Greenwood* v. *Hornsey*,[2] following *Tapling* v. *Jones* and *Scott* v. *Pape*, it was held that an intention to abandon must be clearly established by the evidence, and that no intention to abandon an easement of light could be inferred from the pulling down of the old building and the advancement of the front of a new building two feet beyond the site of the front of the old building, care having been taken so to arrange the new windows as to preserve the easement of light enjoyed in respect of the old windows.

In *Smith* v. *Baxter*[3] the observations made by Cotton, L.J., in *Scott* v. *Pape*[4] were applied *mutatis mutandis* to the windows in respect of which the plaintiff claimed.

Colls v. Home and Colonial Stores, Ltd.

The observations of Lord Davey in *Colls* v. *Home and Colonial Stores, Limited*,[5] appear to indicate that if the building retains its substantial identity, or the ancient lights retain their substantial identity, the easement cannot be treated as having been abandoned.

Ankerson v. Connelly.

Ankerson v. *Connelly*[6] in effect decides that, although a partial alteration of ancient lights, such as the blocking up of a window or some act of the same kind on the part of the owner of the dominant tenement, is not in contemplation of law an abandonment of all his rights in respect of the residue of ancient lights, yet if the rebuilding of the house causes a substantial destruction of all the ancient lights, leaving only a trifling portion of the ancient lights unaffected, the maxim "*De minimis non curat lex*" will apply, and such a reconstruction

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[1] The main decision in *Scott* v. *Pape*, so far as it relates to the question of loss of an easement of light by alteration of buildings, is not affected by *Colls' case*, *see Andrews* v. *Waite* (1907), 2 Ch., 500 (509). As to how *Scott* v. *Pape* is affected by *Colls' case*, *see* Chap. III, Part I, and *supra*, p. 478.

[2] (1886) 33 Ch. D., 471; 55 L. T., 135.

[3] (1900) 2 Ch., 138 (142).

[4] (1886) 31 Ch. D. at p. 567.

[5] (1904) App. Cas., 179 (202), referred to in *Ankerson* v. *Connelly* (1907), 1 Ch. at p. 682.

[6] (1907) 1 Ch., 678.

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of the dominant tenement will be treated as an abandonment of all the ancient lights.

And according to *Andrews* v. *Waite*,[1] the latest decision on the question of abandonment or forfeiture, where after an alteration of the dominant tenement the building remains substantially unchanged in character and the light is put to the same use as before, the real test is not whether the new aperture is in the same vertical plane, but whether substantially the same light is received as had previously been enjoyed for twenty years. *Andrews* v. *Waite.*

(c) *Easements in Water.*

In *Luttrel's case*[2] it was resolved that the alteration of fulling mills into grist mills did not destroy the right to have water come to the mills, provided there was no diversion or stopping of the water by reason of the change. "So if a "man has an old window to his hall, and afterwards he "converts the hall into a parlour or any other use, yet it is "not lawful for his neighbour to stop it, for he shall prescribe "to have the light in such part of his house: and although "in this case the plaintiff has made a question, forasmuch "as he has not prescribed generally to have the said water-"course to his mills generally, but particularly to his fulling "mills, yet forasmuch as in general the mill was the sub-"stance, and the addition demonstrates only the quality, and "the alteration was not of the substance, but only of the "quality, or the name of the mill, and that without any "prejudice in the watercourse to the owner thereof; for "these reasons it was resolved that the prescription remained." *Luttrel's case.*

In *Saunders* v. *Newman*[3] it was decided on similar principles that an alteration in the size of the wheel of an ancient *Saunders* v. *Newman.*

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[1] (1907) 2 Ch., 500.

[2] (1738) 4 Rep. 86*a*. The law on the question how far a variation in a tenement will destroy an easement appurtenant to it is as old as *Luttrel's case*, *per* Lord Davey in *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (202).

[3] (1818) 1 B. & Ald., 258.

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watermill, which by reason of drawing less water than the old one could not injuriously effect a lower riparian owner, was not such an alteration as would deprive the millowner of his easement to have the water flow to his mill in its accustomed manner.

Liggins v. *Inge*.

In *Liggins* v. *Inge* [1] Tindal, C.J., said [2]: "There is nothing "unreasonable in holding that a right which is gained by "occupancy, should be lost by abandonment. Suppose a "person, who formerly had a mill upon a stream, should "pull it down, and remove the works, with the intention "never to return. Could it be held that the owner of other "land adjoining the stream might not erect a mill and "employ the water so relinquished? Or that he would be "compellable to pull down his mill, if the former millowner "should afterwards change his determination, and wish to "rebuild his own?"

"In such a case it would undoubtedly be a subject of "enquiry by a jury, whether he had completely abandoned "the use of the stream, or had left it for a temporary purpose "only; but that question being once determined, there seems "no ground to contend that an action would be maintainable "against the person who erected the new mill, for not "pulling it down again after notice."

Hall v. *Swift*.

In *Hall* v. *Swift* [3] it was held, that the slight alteration of a watercourse merely for the greater convenience of the plaintiff in the enjoyment of his right to use the water for purposes of irrigation, did not destroy the right.

Hale v. *Oldroyd*.

In *Hale* v. *Oldroyd*,[4] where the plaintiff had enjoyed a prescriptive right to the flow of water into an ancient pond on his premises, but had about thirty years before action made three new ponds in different places on the same premises and diverted the water to them, and thenceforth disused the old pond, it was held that a substitution of that

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[1] (1831) 7 Bing., 682.
[2] *Ibid.* at p. 693.
[3] (1838) 6 Scott., 167; 4 Bing. N. C., 381; 44 R. R., 728.
[4] (1845) 14 M. & W., 789.

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nature was not an abandonment of his right to the flow of water to the old pond.

In *Watts* v. *Kelson*[1] Mellish, L.J., observed: "It was "further objected, that the fact of the plaintiff having pulled "down the cattle-sheds and erected cottages in their place, "deprived him of the right to the use of water. We are of "opinion, however, that what passed to the plaintiff was a "right to have the water flow in the accustomed manner "through the defendant's premises to his premises, and that "when it arrived at his premises he could do what he liked "with it, and that he would not lose this right to the water "by any alteration he might make in his premises." *Watts* v. *Kelson.*

(*d*) *Easements of Support.*

The abandonment of easements of support by a permanent alteration of the dominant tenement is governed by the same principles as that of other negative easements.

Thus, it was said by Cockburn, C.J., in *Angus* v. *Dalton*[2]: "It is scarcely necessary to observe that any easement of "lateral support, which may have attached to the plaintiff's "premises as the house before stood, was lost by the taking "down of the old house and substituting a building of an "entirely different construction as regards the wall or "foundation on which it rested." *Angus* v. *Dalton.*

II. Abandonment of Affirmative or Discontinuous Easements.

(*a*) *Under the General Law.*

Under the general law outside the Indian Easements Act, affirmative or discontinuous easements may be extinguished by a cessation of user, either coupled with an express disclaimer of the right or accompanied by other circumstances indicative of an intention to abandon without reference to the duration of the cesser. General conditions of.

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[1] (1871) L. R., 6 Ch. App., 166 (175).

[2] (1877) 3 Q. B. D. at p. 102.

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Having regard to the nature of discontinuous easements and the manner of their enjoyment, no rule of general application can be stated to precisely define after what period of time, and in conjunction with what special circumstances, a cessation of enjoyment may be treated as an intentional abandonment.

Notwithstanding the suggestion made in earlier times, that, by analogy to the period of enjoyment necessary to raise the presumption of a grant, non-user for a similar period should be required to raise the presumption of a release, a process of reasoning which Littledale, J., in *Moore* v. *Rawson*[1] thought might apply to a right of common or of way, the tendency in later times has been to rely solely on intention, and neither by a fixed rule of law nor a conclusive presumption of fact to prescribe a definite period of non-user as essential to the loss of a discontinuous easement.[2]

Hence it may now be taken that the abandonment of a discontinuous easement will not be presumed from non-user alone, whatever its duration; that non-user is to be regarded as material only in relation to intention as one of the elements thereof, and that the sufficiency of its duration in any particular case must depend on all the surrounding circumstances.

It will be useful to examine the authorities somewhat in detail as bearing on the question of intention as shewn, *first*, by non-user coupled with a disclaimer, and *secondly*, by non-user coupled with some act of the dominant owner on the dominant tenement.[3]

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[1] (1824) 3 B. & C. at p. 339; 27 R. R. at p. 381.

[2] *See Reg.* v. *Chorley* (1848), 12 Q. B., 515; 76 R. R., 330, and the later cases cited *infra*.

[3] The inquiry as to evidence of intention is here purposely limited to something done by the dominant owner on the dominant tenement. It is completed as regards acts done by the dominant or servient owner on the servient tenement, *infra* under D. I (*a*), in connection with the excessive user of discontinuous easements, and *supra* under B, "Extinction through the authorised act of the servient owner."

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First—*As to Non-user coupled with Disclaimer.*

In *Norbury* v. *Meade*[1] Lord Redesdale says: "In the case "of a right of way over the lands of other persons, being an "easement belonging to lands, if the owner chooses to say I "have no right of way over those lands, that is disclaiming "that right of way; and though the previous title might be "shewn, a subsequent release of the right would be pre-"sumed."

But the disclaimer must be express. It cannot be implied from mere non-user not accompanied by a clear intention to abandon, for "it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it."[2]

Secondly—*As to Non-user coupled with some act of the dominant owner on the dominant tenement shewing an intention to abandon.*

In *Bower* v. *Hill*[3] it appeared that the defendant as the occupier of one entire property, known as the *King's Head Inn* and yard, and having a frontage on a stream along which there was a right of passage by boats and barges referable to the *King's Head Inn* and yard, and to those premises only, had five years before action put up a pair of gates in such a position as to separate the yard from the stream, and that this space of ground had since been in the possession of the plaintiff, who claimed to exercise the right of way by virtue of the said space of ground abutting on the stream. *Bower* v. *Hill*.

It was held that the plaintiff's claim could not be sustained as the grant of the easement operated only in favour of the owner of the *King's Head Inn* and yard, and that the grant was still in full force, there having been no extinguishment, but at most a temporary suspension of enjoyment on the part of the grantee, who might resume user at any time by taking any part of the frontage into his possessions.

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[1] (1821) 3 Bligh. at p. 241.

[2] *See James* v. *Stevenson* (1893) App. Cas., 162 (168). 535.

[3] (1835) 2 Bing. N. C., 339; 2 Scott.

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Reg. v. *Chorley.*

Regina v. *Chorley*,[1] was an indictment for obstructing a public foot-way through a narrow lane by driving carts and horses on it. The defence having set up a prior private carriage-way to premises which were used as a malthouse, a verdict was passed accordingly.

A *rule nisi* obtained by the plaintiffs for a new trial was made absolute on the ground that the Judge had misdirected the jury in telling them that nothing short of twenty years' user by the public would destroy the private right. The law is clearly stated by Lord Denman, C.J., who delivered the judgment of the Court. He said: "The learned judge "appears to have proceeded on the ground, that, as twenty "years' user in the absence of an express grant would have "been necessary for the acquisition of the right, so twenty "years' cesser of the use in the absence of any express "release was necessary for its loss. But we apprehend that, "as an express release of the easement would destroy it at "any moment, so the cesser of use coupled with any act "clearly indicative of an intention to abandon the right would "have the same effect without any reference to time. For "example, this being a right of way to the defendant's malt-"house, and the mode of user by driving carts and waggons "to an entrance from the lane into the malthouse yard, if the "defendant had removed his malthouse, turned the premises "to some other use, and walled up the entrance, and then for "any considerable period of time acquiesced in the unre-"strained use by the public, we conceive the easement would "have been clearly gone. It is not so much the duration of "the cesser as the nature of the act done by the grantee of "the easement, or of the adverse act acquiesced in by him,[2] "and the intention in him which either the one or the other "indicates, which are material for the consideration of the "jury. The period of time is only material as one element

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[1] (1848) 12 Q. B., 515 (518); 76 R. R., 330 (332).

[2] As to this, *see supra*, B, under "Extinction through the authorised act of the servient owner."

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"from which the grantee's intention to restrain or abandon "his easement may be inferred against him; and what period "may be sufficient in any particular case must depend on all "the accompanying circumstances. This is the principle on "which the judgments of all the members of this Court "proceeded in *Moore* v. *Rawson*,[1] and which was adopted in "*Liggins* v. *Inge*."[2]

Ward v. *Ward*.

In *Ward* v. *Ward*[3] it was held that an easement of way was not lost by non-user for more than twenty years on the part of former owners of the dominant tenement, whose reason for not using the way was that they had otherwise a more convenient means of access to the dominant tenement.

In the course of the argument Alderson, B., observed: "The presumption of abandonment cannot be made from the "mere fact of non-user. There must be other circumstances "in the case to raise that presumption. The right is acquired "by adverse enjoyment. The non-user, therefore, must be "the consequence of something which is adverse to the "user."[4]

Cook v. *Mayor and Corporation of Bath*.

In *Cook* v. *Mayor and Corporation of Bath*,[5] the plaintiff closed the back door in his premises in respect of which he claimed a right of way, and it remained so closed for thirty years. About four years prior to suit he reopened the door. It was held that these circumstances of themselves constituted no abandonment of the easement. Vice-Chancellor Malins said: "A right of way or a right to light may be abandoned, "and it is always a question of fact to be ascertained by a "jury, or by the court, from the surrounding circumstances, "whether the act amounts to an abandonment, or was "intended as such."

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[1] (1824) 3 B. & C., 332; 27 R. R., 375.

[2] (1831) 7 Bing., 682, 693.

[3] (1852) 7 Exch., 838.

[4] This observation must not be taken as exclusive, for it is clear that the non-user of an affirmative easement would also be a material element of intention if it followed from an alteration of the dominant tenement, *see* the illustration given by Lord Denman, C.J., in *Reg.* v. *Chorley*, *ubi sup*.

[5] (1868) L. R., 6 Eq., 177.

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Crossley v. *Lightowler.*

The same general principle was recognised in the case of *Crossley & Sons, Limited* v. *Lightowler*,[1] both by Vice-Chancellor Page Wood at the original hearing, and by Lord Chancellor Chelmsford on appeal.

The former judge said[2]: "The question of abandonment, "I quite concede to the Counsel for the defendants, is a very "nice one. On that a great number of authorities have been "cited, which appear to me to come to this, that the mere "non-user of a privilege or an easement is not in itself an "abandonment that in any way concludes the claimant; but "the non-user is evidence with reference to the abandonment. "The question of abandonment is a question of fact that must "be determined upon the whole of the circumstances of the "case."

On appeal Lord Chelmsford referred with approval to *Moore* v. *Rawson* and *Regina* v. *Chorley* as establishing general principles, and said[3]: "The authorities upon the "subject of abandonment have decided that a mere suspension "of the exercise of a right is not sufficient to prove an inten-"tion to abandon it. But a long continued suspension may "render it necessary for the person claiming the right to "shew that some indication was given during the period that "he ceased to use the right of his intention to preserve it. "The question of abandonment of a right is one of intention, "to be decided upon the facts of each particular case."[4]

Cooke v. *Ingram.*

In *Cooke* v. *Ingram*[5] the grantee of a way was also given the right to come out on to it at any point at which he could get access to it. It was held that he was at liberty to erect a paling all along his boundary and only open one gate in it for access to the road without being taken to have abandoned his right of access at any other point.

James v. *Stevenson.*

In *James* v. *Stevenson*[6] one of the questions in issue was whether absence of user by the respondents of a right of way

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[1] (1866) L. R., 3 Eq., 279, on appeal (1867), L. R., 2 Ch. App., 478.

[2] L. R., 3 Eq. at p. 292.

[3] L. R., 2 Ch. App. at p. 482.

[4] Cited with approval in *James* v. *Stevenson* (1893), App. Cas., 162 (167).

[5] (1893) 68 L. T., 671.

[6] (1893) App. Cas., 162.

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between the years 1829 and 1875 in respect of portions of land subject to the easement (there being no occasion for them to use it except once, in 1872, when they did use it), coupled with the occupation by the appellant for agricultural purposes of the same portions of land, when the easement was not required, amounted to a partial abandonment, and, if it did, whether such partial abandonment caused an abandonment of the entire right.

Since 1875 there had been open user of the whole road in assertion of that right.

It was held that since abandonment was a question of intention to be decided upon the facts of each particular case, as was expressly laid down in *Crossley* v. *Lightowler*[1] the facts above stated not only did not prove an entire abandonment, but were insufficient to shew even an intention to abandon a portion of the right.

Midland Ry. Co. v. *Gribble.*

In *Midland Railway Company* v. *Gribble*[2] it was held that a severance by the common owner of lands lying on each side of the plaintiff Company's line of railway without granting any right of way over the land retained, or reserving any right of way over the land conveyed, was a clear abandonment of an occupation way which at the time of severance the common owner had over the same line of railway for the accommodation of the intersected lands.

Young v. *Star Omnibus Co., Ltd.*

In *Young* v. *Star Omnibus Company, Limited*,[3] which was an action to assert a right of way over a strip of land 10 feet wide in the occupation of the defendants, it was pleaded in defence that prior to action brought the plaintiffs had abandoned the easement by the erection of a summer-house which projected over the strip of land, but it was held that even if this were a partial abandonment of the easement, it was not sufficient evidence in the circumstances of an intention to relinquish the easement so far as it remained capable of enjoyment after the erection of the summer-house.

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[1] (1867) L. R., 2 Ch. App., 478.
[2] (1895) 2 Ch., 827.
[3] (1902) 86 L. T., 41.

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The Indian decisions proceed upon the same lines as the English.

Teaka Ram v. Doorga Pershad.

In *Teaka Ram* v. *Doorga Pershad*,[1] the plaintiff sought to enforce the right to discharge rain-water on to the defendant's land in respect of a house which had not been in existence for several years, and it was held that the destruction of the house and the discontinuance of enjoyment clearly shewed an intention on the part of the plaintiff to permanently abandon the easement, and the suit must therefore fail.

Huree Doss Nundee v. Judoonath Dutt.

In *Huree Doss Nundee* v. *Judoonath Dutt*[2] the plaintiff failed to establish the existence of a right of way to a tank, by reason of the fact that the house in respect of which the easement was claimed had remained unoccupied for six years, and it was thought that this was sufficient to shew an intention to abandon a right which in its nature was one that could only be preserved by constant use.

Chunder Kant Chowdhry v. Nund Lall Chowdhry.

Chunder Kant Chowdhry v. *Nund Lall Chowdhry*[3] shews that every case must be decided on its special circumstances, and that non-user may be accepted as evidence of abandonment.

Raj Beharee Roy v. Tara Persad Roy.

Raj Beharee Roy v. *Tara Persad Roy*[4] recognises the proposition to be found in all the English authorities that abandonment is a question of fact to be determined upon the particular circumstances of each case, and that non-user when accompanied by acts shewing an intention to abandon, is fatal to the resumption of an easement and need not extend over any definite period of time.

Temporary cessation of user or slight alteration of dominant tenement, effect of.

It is established by some of the authorities above cited that a temporary cessation of user or a slight alteration of the dominant tenement when not accompanied by circumstances shewing a manifest intention to relinquish the easement does not of itself amount to an abandonment.[5]

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[1] (1866) 1 Agra H. C. R. N. W. P., 196.

[2] (1870) 14 W. R., 79.

[3] (1871) 16 W. R., 277.

[4] (1873) 20 W. R., 188.

[5] *Bower* v. *Hill*; *Cook* v. *Mayor and Corporation of Bath*; *Crossley* v. *Lightowler*, *ubi sup.*

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So, too, a cessation of user by agreement with the servient owner, in the absence of other circumstances shewing an intention to abandon, is not an abandonment.[1] Thus, a parol agreement for the substitution of a new way for an old prescriptive one, and a consequent discontinuance of the old way, are facts by themselves insufficient to prove an abandonment.[2]

Cessation of user by agreement.

But where with the consent of the dominant owner a new way is substituted for a pre-existing one, and the cessation of user as regards the original easement is accompanied by acts shewing a clear intention to abandon, the original easement cannot be resumed.[3]

Further, non-user attributable to some cause over which the dominant owner has no control cannot be made a ground of abandonment. Thus, the excessive dryness of seasons causing a discontinuance of an easement in water, or a succession of rainy seasons causing the non-user of a right of way, does not cause an extinguishment of the right.[4]

Effect of non-user attributable to *vis major*.

An abandonment of part of a right of way is not necessarily an abandonment of the whole.[5]

Partial abandonment.

And when a continuous way is exercised over more than one servient tenement, non-user amounting to abandonment in respect of one servient tenement does not operate to extinguish the right in respect of the other or others, as the way must be regarded as two or more independent

Continuous way.

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[1] *Carr* v. *Foster* (1842), 61 R. R. at p. 324; 3 Q. B. at p. 585, per Patteson, J.; *Lovell* v. *Smith* (1857), 3 C. B. N. S., 120; *Mulville* v. *Fallon* (1872), I. R., 6 Eq., 458.

[2] *Lovell* v. *Smith*, *ubi sup.*

[3] *Mulville* v. *Fallon*, *ubi sup.*

[4] *Hall* v. *Swift* (1838), 6 Scott, 167; 4 Bing. N. C., 381; 44 R. R., 728. Note the analogous rule in Indian cases that interruption during the prescriptive period in the user of a right which is limited in its exercise to a certain period or season of the year is not fatal to the acquisition of the right, *see* *Ramsoonder Bural* v. *Woomakunt Chuckerbutty* (1864), 1 W. R., 217; *Oomur Shah* v. *Ramzan Ali* (1868), 10 W. R., 363; *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory* (1874), 22 W. R., 302; *Sheik Mahomed Ansar* v. *Sheik Sefatoolla* (1874), 22 W. R., 340; *Koylash Chander Ghose* v. *Sonatun Chang Baroie* (1881), I. L. R., 7 Cal., 132; 8 Cal. L. R., 281.

[5] *James* v. *Stevenson* (1893), App. Cas., 162; *Young* v. *Star Omnibus Co., Ltd.* (1902), 86 L. T., 41.

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ways[1]; and when a way over an intermediate tenement is of no immediate use because the way over a further tenement has not been acquired, the right over the first tenement is not thereby lost.[2]

(b) *Under the Indian Easements Act.*

The provisions of the Indian Easements Act relating to the abandonment of affirmative or discontinuous easements are to be found in section 38, Expl. I (*b*), ill. (*c*) and Expl. II, and the whole of section 47[3] (except the first paragraph, which deals with continuous easements).

S. 38, Expl. I (*b*).

Under Explanation I (*b*) of section 38 an easement is impliedly released where any permanent alteration is made in the dominant tenement of such a nature as to shew that the dominant owner intended to cease to enjoy the easement in future.[4]

This provision is in accordance with the general law as above considered.

S. 38, Expl. II.

Under Explanation II of the same section mere non-user of an easement is not an implied release within the meaning of this section. Presumably, this provision is intended to carry out the general doctrine that non-user by itself, unaccompanied by other circumstances, cannot raise a presumption of abandonment.[5]

S. 47, paras. 2 and 3.

But by section 47, which provides that a discontinuous easement is extinguished when it has not been enjoyed as such for an unbroken period of twenty years, such period to be reckoned from the day on which it was last enjoyed by any person as dominant owner, the Indian legislature has availed itself of the analogy suggested in *Moore* v. *Rawson*,[6] and adopted

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[1] *See* the judgment of Rigby, L.J., in *Midland Ry. Co.* v. *Gribble* (1905), 2 Ch., 827, and I. E. Act, s. 47, last para.; illustration, App. VII.

[2] *Midland Ry. Co.* v. *Gribble*, *ubi sup.*

[3] *See* App. VII, for the exact text.

[4] *See* ill. (*e*) to the section, App. VII.

[5] *Supra*, II (*a*), Under the General Law.

[6] (1824) 3 B. & C. at p. 339; 27 R. R. at p. 381.

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a fixed rule,[1] rejecting the later principle of the general law under which, as already explained, intention is made the sole basis of abandonment without reference to any definite period of non-user.[2]

Other provisions of s. 47.

By paragraph 4 of section 47 of the Indian Easements Act it is provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers under the Indian Registration Act, III of 1877, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Under paragraph 5 of the same section, the enjoyment of a limited easement during the same period in any way or for any purpose beyond its limits will not prevent its extinction under the section.[3]

By paragraph 6 the circumstance that, during the said period, no one was in possession of the servient tenement, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under the section.

But an easement is not extinguished under the section—

(*a*) Where the cessation is in pursuance of a contract between the dominant and servient owners[4];

(*b*) Where the dominant tenement is held in co-ownership and one of the co-owners enjoys the easements within the said period of twenty years;

(*c*) Or where the easement is a necessary easement.[5]

Where several tenements are respectively subject to rights

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[1] *See Gazette* of India (1880), July to Dec., Part V, p. 479.

[2] *Supra*, II (*a*), Under the General Law. Obviously such changed enjoyment might shew an intention to abandon, and at the end of the twenty years a fresh easement of a different character might be acquired.

[4] *Query* whether this provision is intended to be exhaustive. Presumably, the contract here meant is a contract under which the cessation of user is not accompanied by circumstances shewing an intention to abandon, *see supra*, II (*a*), Under the General Law.

[5] *See* Chap. X, Part I (*d*).

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of way for the benefit of a single tenement, and the ways are continuous, such rights shall, for the purposes of the section, be deemed to be a single easement.[1]

D.—Extinction by Forfeiture.

I. Under the General Law.

General conditions of.

This method of extinction is founded on the general principle that the burthen on the servient tenement may not be increased by anything done by the owner of the dominant tenement.

The question here is not one so much of cessation of enjoyment, as in the case of an abandonment, as one of additional, or otherwise changed, user and its effect upon the existence of the easement.

The subject may conveniently be treated in relation to the two principal classes of easements, affirmative and negative.

As regards the former class, which depend for their enjoyment on a repetition of some particular act or acts of the dominant owner upon the servient tenement, the inquiry will be limited to the effect of an *extended* user merely,[2] but as regards the latter class, which depend for their enjoyment on a permanent arrangement of the dominant tenement, it will be necessary to consider not only the effect of an *extended*, or otherwise changed, user in reference to the class generally, but also the effect of a *diminished* user in special reference to easements of light.

(a) In relation to Affirmative or Discontinuous Easements.

Excessive user, effect of.

With regard to affirmative or discontinuous easements, such as, for example, easements of way and easements to take

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[1] The word "continuous" as used here is evidently not meant to express the legal phrase as applied to easements, but to mean, "physically continuous," *see* the illustration to the section, App. VII; and *supra*, the general law under II (*a*), "Continuous way."

[2] The effect on an affirmative easement of a change in the character of the dominant tenement has already been considered in connection with the question of abandonment, *supra*, C. II.

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water, an excessive user, being easily ascertainable, does not of itself affect the pre-existing easement.[1]

Thus, where a man having a right of foot-way along a road uses it as a carriage-way, such excessive user does not destroy the right of foot-way, as the two kinds of user are distinguishable and separable, and whilst it renders the owner of the right of foot-way liable in trespass, it does not prevent him from maintaining an action for the disturbance of his right.[2]

So, too, the user of a right of way for the purpose of giving access to land to which the easement is not appurtenant does not of itself destroy the easement, but gives the servient owner a right by declaration or otherwise to have the exercise of the easement confined within its legal limits.[3]

(b) In relation to Negative or Continuous Easements.

The general principle upon which the forfeiture of negative or continuous easements proceeds is that by a permanent alteration of the dominant tenement an additional and illegal burthen has been thrown on the servient tenement.

In the application of this general principle most of the difficulties, and by far the greater number of cases, have occurred in connection with easements of light, and it is, therefore, thought convenient to take this particular class of negative easements first, and, after summarising the principles applicable to their loss by forfeiture, as such principles now appear to be established by judicial authority, to examine the decisions themselves.

(1) *Easements of Light and Air.*

Principles applicable to loss of easements of light and air by forfeiture.

Under the general law, the question as to how far an alteration of a building will affect an easement of light appurtenant thereto is one of considerable complexity and

[1] *See* Gale on Easements, 8th Ed., p. 566.

[2] *Ibid.*

[3] *Harris v. Flower & Son* (1905), 91 L. T., 816.

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depends on a diversity of considerations arising out of the particular method and purpose of the alteration.

The following propositions may be collected from the English and Indian decisions :—

First, the pulling down of the dominant building and the erection of a new building in its place does not of itself cause a forfeiture of the easement, or a loss of the growing right; the material question in each case being whether, after the alteration, the building or ancient lights retain their substantial identity.[1]

Secondly, if such substantial identity is retained neither a setting back of the old wall,[2] nor a setting forward of it,[3] nor an alteration in the plane of the old wall or aperture,[4] nor an enlargement of the old aperture,[5] nor the opening of a new aperture by the side of, or at a different angle to, the old aperture,[6] will destroy the pre-existing easement.

Thirdly, if such substantial identity is retained, the easement is not lost or varied by any change in the use which is made of the internal chambers of the building or by any alteration which may be made in the internal structure of it.[7]

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[1] *Curriers' Co.* v. *Corbett* (1865), 2 Dr. & Sm. 355; *Fowlers* v. *Walker* (1881), 51 L. J. Ch., 443; *Pendarves* v. *Munro* (1892), 1 Ch., 611; *Caspersz* v. *Raj Kumar* (1898), 3 Cal. W. N., 28; *Smith* v. *Baxter* (1900), 2 Ch., 138; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (202); *Ankerson* v. *Connelly* (1907), 1 Ch., 678 (682); *Andrews* v. *Waite* (1907), 2 Ch., 500. Thus, a reconstruction which, wholly or substantially, destroys the identity of the dominant building causes a forfeiture of the easement, *Hutchinson* v. *Copestake* (1861), 9 C. B. N. S., 863 (reconcilable in this respect with *Tapling* v. *Jones* (1865), 11 H. L. C., 290, *see Newson* v. *Pender* (1884), 27 Ch. D. at pp. 55, 56, 60, 61); *Pendarves* v. *Munro* (1892), 1 Ch., 611; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (202); *Ankerson* v. *Connelly* (1907), 1 Ch., 678 (684).

[2] *Barnes* v. *Loach* (1879), 4 Q. B. D., 494; *Bullers* v. *Dickinson* (1885), 29 Ch. D., 155.

[3] *Scott* v. *Pape* (1886), 31 Ch. D., 554; *Andrews* v. *Waite*, *ubi sup.*

[4] *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1877), 6 Ch. D., 757; *Barnes* v. *Loach*; *Bullers* v. *Dickinson*; *Scott* v. *Pape*; *Andrews* v. *Waite*, *ubi sup.*

[5] *East India Co.* v. *Vincent* (1740), 2 Atk., 83; *Chandler* v. *Thompson* (1811), 3 Camp., 80; *Newson* v. *Pender* (1884), 27 Ch. D., 43; *Colls* v. *Home and Colonial Stores, Ltd.*, *ubi sup.* at p. 211.

[6] *East India Co.* v. *Vincent*; *Barnes* v. *Loach*, *ubi sup.*; *Tapling* v. *Jones* (1865), 11 H. L. C., 290.

[7] *Luttrel's case* (1738), 4 Rep. 86a; *Ecclesiastical Commissioners* v. *Kino*

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Fourthly, if the alteration is such as materially to affect the substance of the building, and thereby to increase the quantity of light required by the dominant tenement, the easement cannot be made use of for the extended purposes of the new building.[1]

Fifthly, although there is no legal inference that the owner of the dominant tenement merely by rebuilding does not intend to retain his former right to light, yet the alteration of the dominant tenement may be such as to throw on the owner thereof the burthen of shewing that the building or the ancient lights have not lost their substantial identity, and, for this purpose, it is expedient that a satisfactory record of the relative size and position of the old apertures should have been kept.[2]

Sixthly, if by a permanent alteration of the dominant tenement the ancient lights be materially diminished, such diminution will now (under the general law) increase the burthen on the servient tenement, and the servient owner will be entitled to obstruct the remnant of ancient light provided that such obstruction would not have amounted to a nuisance before the alteration.[3]

It is proposed to examine in chronological order the authorities supporting the foregoing propositions.

In *Luttrel's case*[4] it was said: "So if a man has an old window in his hall, and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house." *Luttrel's case.*

In *East India Company* v. *Vincent*[5] Lord Chancellor Hardwicke said: "If I should give an opinion that lengthening *East India Co.* v. *Vincent.*

(1880), 14 Ch. D., 213; *Scott* v. *Pape* (1886), 31 Ch. D., 554, 569; *Colls* v. *Home and Colonial Stores, Ltd.*, *ubi sup.* at p. 202.

[1] *Luttrel's case*, *ubi sup.*; *Martin* v. *Goble* (1808), 1 Camp., 320; *Colls* v. *Home and Colonial Stores, Ltd.*, *ubi sup.* at pp. 202, 211.

[2] *Fowlers* v. *Walker*; *Newson* v. *Pender*; *Scott* v. *Pape*; *Pendarves* v. *Munro*; *Smith* v. *Baxter*, *ubi sup.*

[3] *Ankerson* v. *Connelly* (1907), 1 Ch., 678.

[4] (1738) 4 Rep. 86*a*.

[5] (1740) 2 Atk., 83.

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"of windows, or making more lights in the old wall than "there were formerly, would vary the rights of persons, "it might create innumerable disputes in populous cities, "especially in *London*, and therefore I do not give an absolute "opinion, but I should rather think it does not vary the "right."

In *Martin* v. *Goble*,[1] which was an action for obstructing lights, an ancient malthouse had been converted into a workhouse, and it was held that the new building was not entitled to more light than was necessary for the purposes of a malthouse.

M'Donald, C.B., said: "The house was entitled to the "degree of light necessary for a malthouse, not for a "dwelling-house; the converting it from the one into the "other could not affect the rights of the owners of the adjoining "ground. No man could, by any act of his own, suddenly "impose a new restriction on his neighbour."

"This house had for twenty years enjoyed light sufficient "for a malthouse; and up to this extent, and no further, the "plaintiffs could still require that light should be admitted "to it."[2]

Chandler v. Thompson.

Chandler v. *Thompson*[3] was an action on the case for stopping up a window in the plaintiff's dwelling-house. It appeared that about three years before action the plaintiff considerably enlarged an ancient window in his dwelling-house, both in height and width, and put in a sash frame instead of a leaded casement. The defendant, who was the adjoining owner, then erected the building complained of, which completely obstructed several inches of the space occupied by the old window, but still admitted more light to

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[1] (1808) 1 Camp., 320.

[2] This language has been the subject of much criticism, and, at first sight, appears to have a wider scope than was intended. But, as pointed out in *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179, 202, 211, it may be supported on the ground that the alteration affected the substance of the building and that the purpose for which a building may be used cannot enlarge the easement, and so throw an increased burthen on the servient tenement.

[3] (1811) 3 Camp., 80.

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pass through the new window than the plaintiff had enjoyed before the alteration.

It was contended that as the plaintiff was only entitled to so much light as he had appropriated by twenty years' enjoyment, he could not complain of the existing obstruction which still left him more light than he had enjoyed before the alteration, but it was decided that the whole of the space occupied by the old window was privileged; that it was actionable to prevent the light and air from passing through the window, as it had formerly done; and that though so much of the new window which constituted the enlargement might be lawfully obstructed, the plaintiff was entitled to the free admission of light and air through the remainder of the window, without reference to what he might derive from other sources.[1]

Blanchard v. *Bridges*.

In *Blanchard* v. *Bridges*[2] it was decided that the extent of the required right must be measured by the enjoyment of it in reference to the size and position of the aperture through which it has been received, and that any change in the dimensions or position of the old aperture would extinguish the right.

This case, decided under the old law before the Prescription Act, is clearly at variance with *Tapling* v. *Jones* and the later decisions[3] which have put the law on quite a different footing.[4]

Curriers' Co. v. *Corbett*.

In *Curriers' Company* v. *Corbett*[5] it was laid down that, where a house having ancient lights is burnt or pulled down and rebuilt, the question whether the pre-existing easement attaches to the new windows is to be determined by inquiring whether the effect of the alteration is to impose on the servient tenement a burthen either substantially additional

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[1] This case though considered to be overruled by *Renshaw* v. *Bean* (1852), 18 Q. B., 112, was reinstated by *Tapling* v. *Jones* (1865), 11 H. L. C., 290, which overruled *Renshaw* v. *Bean*.

[2] (1835) 4 Ad. & E., 176.

[3] *See infra*.

[4] *See* the comments of North, J., in *Scott* v. *Pape* (1886), 31 Ch. D. at p. 561, and of Bowen, L.J., in the same case at p. 573.

[5] (1865) 2 Dr. & Sm., 355.

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to, or substantially different from, the burthen to which it was subjected when the old house existed.

Tapling v. *Jones*.

Tapling v. *Jones*[1] is a very important and instructive case and has already been considered in reference to the extent of the servient owner's right to obstruct an excessive or changed user of an easement of light.[2]

In connection with the present subject, the material facts of the case were that the plaintiff had made extensive alterations in his house, and in so doing had opened new, and had enlarged old, windows. To this the defendant had replied by erecting a permanent building on his own land so near to the house of the plaintiff as to obstruct not only the new windows, but also the old. Subsequently the plaintiff having caused the altered windows to be restored to their original condition, and the spaces occupied by the new windows to be filled up with brickwork, had called on the defendant to pull down his building, which the defendant having failed to do, an action was brought for the obstruction of lights.

At the trial a verdict was taken for the plaintiff, subject to a special case which was afterwards argued before the Court of Common Pleas.[3] The majority of the Court having eventually found in favour of the plaintiff, the case was taken in error to the Exchequer Chamber.[4] Here, also, there was a difference of opinion amongst the judges, but by a considerable majority the judgment given for the plaintiff below was affirmed.

The case was then taken in error to the House of Lords with the result that the judgment of the Exchequer Chamber was affirmed, but on different grounds from those on which it proceeded.

Renshaw v. *Bean*; *Hutchinson* v. *Copestake*, overruled.

By the decision of the House of Lords it is finally settled (overruling *Renshaw* v. *Bean*[5] and *Hutchinson* v. *Copestake*[6])

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[1] (1865) 11 H. L. C., 290.
[2] *See* Chap. VIII, Part I. A.
[3] (1862) 11 C. B. N. S., 283.
[4] (1862) 12 C. B. N. S., 826.
[5] (1852) 18 Q. B., 112.
[6] (1860) 8 C. B. N. S., 102; (1861) 9 C. B. N. S., 863. These cases decided that if the owner of ancient lights opens new windows in such a position that an adjoining proprietor cannot conveniently

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that an easement of light is not lost by any attempt to extend the user of it beyond its original limits, which is in itself an innocent and not a wrongful act, and that the remedy of the servient owner is to obstruct the extension on the servient tenement, provided he can do so without obstructing the ancient light.

Thus, the opening of a new window, or the enlargement of an old window, will not destroy the pre-existing easement in respect of the old window, nor will it give a new right to obstruct the old window or revive an old right of obstruction which existed before the window became an ancient one.

Lord Westbury, after observing that the right to ancient lights now depends on positive enactment (2 & 3 Will. 4, c. 71),[1] and so does not require, and ought not to be rested on, any prescription or fiction of a license, continues as follows[2]:—

"It must also be observed, that after an enjoyment of "access of light for twenty years without interruption, "the right is declared by the statute to be absolute and "indefeasible,[3] and it would seem therefore that it cannot "be lost or defeated by a subsequent temporary intermis- "sion of enjoyment, not amounting to abandonment. More- "over, this absolute and indefeasible right, which is the "creation of the statute, is not subjected to any condition "or qualification; nor is it made liable to be affected or pre- "judiced by any attempt to extend the access or use of light "beyond that which, having been enjoyed uninterruptedly

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obstruct the new windows without obstructing the old, he may obstruct the old. But *query* whether on a true construction, *Hutchinson* v. *Copestake* is really at variance with *Tapling* v. *Jones*, *see* the judgments of the Court of Appeal in *Newson* v. *Pender* (1884), 27 Ch. D., 43, 55, 56, 60, 61, and *supra*, p. 476, and further *infra*.

[1] The English Prescription Act, corresponding to the Indian Limitation Act and Indian Easements Act, *see* Chap. VII, Parts II and III. But these Acts are not exclusive or prohibitive of the common law method of acquisition by immemorial user, *Ibid*.

[2] 11 H. L. C. at p. 304.

[3] But as to when a title is acquired under the Act, *see Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179, 189, 190; *Hyman* v. *Van der Bergh* (1908), 1 Ch., 167; and Chap. VII, Part I, B.

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"during the required period", is declared to be not liable to "be defeated."

Later on, he says [1]: "Suppose then that the owner of a "dwelling-house with such a window, that is, with an absolute "and indefeasible right to a certain access of light, opens two "other windows, one on each side of the old window, does the "indefeasible right become thereby defeasible? By opening "the new window he does no injury or wrong in the eye of "the law to his neighbour, who is at liberty to build up "against them, so far as he possesses the right of so building "on his land; but it must be remembered that he possesses "no right of building so as to obstruct the ancient window; "for to that extent his right of building was gone by the "indefeasible right which the statute has conferred."

The judgment of Lord Cranworth is based on similar reasoning.[2]

Lord Chelmsford, in his luminous judgment, says [3]—

"The owner of the privileged window does nothing un- "lawful if he enlarges it, or if he makes a new window in a "different situation. The adjoining owner is at liberty to "build upon his own ground so as to obstruct the addition to "the old window, or to shut out the new one; but he does not "regain his former right of obstructing the old window which "he had lost by acquiescence, nor does the owner of the old "window lose his former absolute and indefeasible right to it, "which he had gained by length of user. The right continues "uninterruptedly until some unequivocal act of intentional "abandonment is done by the person who has acquired it, "which will remit the adjoining owner to the unrestricted "use of his own premises."

In dealing with the contention of the appellant's Counsel that the alteration of the dominant tenement had destroyed the previously acquired right to light and air in respect of an unaltered window, he says [4]—

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[1] 11 H. L. C. at p. 306.
[2] *Ibid.*, pp. 308-315.
[3] *Ibid.* at p. 318.
[4] *Ibid.* at p. 319.

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"As to this, they contended that the alteration of the "windows below, and the addition of the windows above, so "changed the character of the previously acquired right to "light and air as entirely to destroy it. But it is not easy to "comprehend how this effect can be produced by acts wholly "unconnected with an ancient window which the owner has "carefully retained in its original state."

In dealing with the effect of the altered windows on such windows themselves, he says[1]—

"As to these, they contended that the owner of ancient "windows is bound to keep himself within the original "dimensions, and that if he changes or enlarges them in any "way, although he retains the old openings in whole or in "part, he must either be taken to have relinquished his right "or to have lost it. But upon what principle can it be said "that a person by endeavouring to extend a right must be "held to have abandoned it, when, so far from manifesting any "such intention, he evinces his determination to retain it, "and to acquire something beyond it? If under such cir- "cumstances abandonment of the right cannot be assumed, as "little can it be said that it is a cause of forfeiture."

National Provincial Plate Glass Insurance Co. v. *Prudential Assurance Co.*

The National Provincial Plate Glass Insurance Company v. *The Prudential Assurance Company*[2] is an authority for the proposition that a change in the plane of old windows cannot affect a right to light previously acquired in respect of such windows.

In that case Fry, J., said[3]: "But then it is said that the "case of *Blanchard* v. *Bridges*[4] is an authority for the proposi- "tion that a change in the plane of the window puts an end "to the right under the statute, although a change of the "aperture by expansion in the same plane would not put an "end to that right. Now, such a conclusion seems to me one "to which the Courts ought not to come, if they can help it. "I am at a loss to see why putting back a window which has

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[1] *Ibid.* at p. 320.
[2] (1877) 6 Ch. D., 737.
[3] *Ibid.* at p. 766.
[4] (1835) 4 Ad. & E., 176, and *see supra.*

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"enjoyed light for twenty years, supposing the planes of the "windows to be parallel, should effect an absolute surrender "of the right which but for the putting back would have "existed. Such a conclusion seems to me to have no reason "or common-sense to support it. And if putting back in a "parallel plane will not work a forfeiture of the right, why "does putting back the front at an angle with the original "plane do so? I confess that I see no reason for the "proposition."

Barnes v. *Loach.*

In *Barnes* v. *Loach*[1] it was decided that the old easement of light was not destroyed either by the setting back of the walls of some cottages in which new windows were opened of the same size and in the same relative positions as the old windows but in a different plane, or by the opening of a window in a new wall built at a different angle to an old window which had been left unchanged.

Fowlers v. *Walker.*

In *Fowlers* v. *Walker*[2] three cottages containing ancient lights were pulled down and a large warehouse was built on their site containing three large windows. No reliable evidence had been preserved as to the positions of the ancient windows, though it was admitted that small portions of the new windows might occupy portions of the space through which light had been admitted to the cottages. It was held (affirming Bacon, V.C.) that it lay on the party claiming the easement to produce satisfactory evidence as to the position of the ancient lights, and that, as he had failed to do so, the easement could not be maintained in respect of the new windows.

Newson v. *Pender.*

In *Newson* v. *Pender*[3] a building containing ancient windows had been pulled down by the plaintiffs and a larger building erected in its place. Photographs had been taken of the old building before it was pulled down as well as of the new building, from which it appeared that some of the new windows occupied substantially the same positions as the old windows, but others covered only a part of the spaces occupied

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[1] (1879) 4 Q. B. D., 494.
[2] (1881) 51 L. J. Ch., 443.
[3] (1881) 27 Ch. D., 43.

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by the old windows and extended considerably beyond them on one side or the other. The defendants having commenced building operations on the opposite side of the street, the plaintiffs moved for and obtained an injunction till the hearing restraining the completion of the building on the ground that such building if completed would shut out the light from the plaintiffs' windows.

Bacon, V.C., having granted an interim injunction, it was contended on appeal, as it had been at the original hearing, that the alteration of the plaintiffs' building amounted to a forfeiture of the old right, and that they were not entitled to protection for any of the new windows.

On the materials before them, and having regard to the intention to preserve the ancient lights shewn by the record kept of the relative positions of the old and the new windows and to the substantial coincidence of some of the new windows with the old, and in the view that the balance of convenience was in favour of granting an injunction rather than allowing the defendants to complete their building with an undertaking to pull it down if required to do so, the Appeal Court continued the injunction.[1]

Bullers v. *Dickinson.*

In *Bullers* v. *Dickinson*[2] a house which had an ancient window in the front room on the ground floor was rebuilt and the front wall which had formerly projected from four to seven feet beyond the general building line was set back into that line; and in the new front wall a window was opened, the position of which substantially coincided with the position of the ancient window in the original front wall.

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[1] It was questioned whether on a true construction of *Hutchinson* v. *Copestake* (1861), 9 C. B. N. S., 863, that case was really at variance with *Tapling* v. *Jones*, *ubi sup.*, since all that *Tapling* v. *Jones* decided was that because a new light had been added there could be no obstruction of windows in respect of which the old easement remained, whereas the decision in *Hutchinson* v. *Copestake*, *ubi sup.*, proceeded on the ground that as there was no window in the new building coincident with the old windows there was no light in the new building which could be considered as a continuation of any ancient light, *see* 27 Ch. D., 55, 56, 60, 61, and *supra*, p. 476.

[2] (1885) 29 Ch. D., 155.

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It was decided that the right to the ancient light had not been lost.

Scott v. *Pape*.

Next comes the important case of *Scott* v. *Pape*,[1] which extends the doctrine laid down in *Tapling* v. *Jones*,[2] and in which the main decision, so far as it relates to the forfeiture of an easement of light by alteration of buildings, has not been affected by the recent decision of the House of Lords in the case of *Colls* v. *Home and Colonial Stores, Limited*.[3]

In *Scott* v. *Pape* the plaintiff was originally the owner of a building having ancient lights in its east wall.

This building the plaintiff pulled down and on its site erected a new building of greater elevation and lighted by larger and more numerous windows.

The east wall had been advanced by varying distances, the effect of which was slightly to alter the plane of the new windows.

No formal record was preserved of the exact positions or dimensions of the old windows, but on a reference made for the purpose, it was found that six of the new windows coincided substantially with three of the ancient windows.

At the hearing, the plaintiff's case for relief was limited to these windows to which the access of light had been obstructed by the defendant's building operations, and an injunction was granted accordingly.

It was held on appeal (affirming the decision of North, J.) that the plaintiff's right to light in respect of these windows had not been lost either by the moving forward of the wall or the alteration, such as it had been, of the windows.

Although since *Colls' case*[4] it is erroneous to speak of an easement of light as constituting a sort of proprietory right in the light itself, or, in reference to the extent of the easement,

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[1] (1886) 31 Ch. D., 554.

[2] (1865) 11 H. L. C., 290, and *see supra*.

[3] (1904) App. Cas., 179, *see Andrews* v. *Waite* (1907), 2 Ch., 500. The decision in *Colls' case* merely displaces the views expressed in *Scott* v. *Pape* and some of the earlier cases as to the nature and extent of an easement of light and the construction of the Prescription Act in relation thereto, *see* Chap. III, Part I.

[4] (1904) App. Cas. 179, 182, 189, 200.

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to use such expressions as a "cone of light" or "specific quantity of light,"[1] as though the easement were a right to a fixed amount of light ascertainable by metes and bounds, or to regard the easement as conferring any greater right than that the obstruction of it shall not amount to a nuisance, the broad principle established by *Scott* v. *Pape* that, provided the ancient lights retain their substantial identity, mere structural identity is immaterial and an alteration in the size or position or plane of the old windows, or in the use which is made of the dominant building, will not destroy the easement, has not been controverted by any of the later decisions.

And as the material question in all cases of the obstruction of apertures in reconstructed buildings is still the identity of the light,[2] the obvious advantage to the owner of the dominant tenement of preserving satisfactory evidence as to position of the old apertures is clearly demonstrated in *Scott* v. *Pape*.

"It may be that in some cases, even although there is not "such an alteration as would deprive the plaintiff of his "right, he may by other means have precluded himself from "insisting on it, because he may have so altered his building, "or be so wanting in evidence as to what the position of the "old window was, that though he may be actually enjoying a "portion of the old light, he cannot shew it, and so by a "mere defect of evidence he will be unable to enforce such "a right as he has."[3]

And, upon this subject, Fry, L.J., says[4]: "Again, it may "well be that the alteration of a building may put an end "to the plaintiff's right in this way, that it has become "impossible for him to prove that the access of light he is "claiming is the same as that which existed to the old "window. Whenever such a difficulty of proof arises in the

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[1] *See* these expressions used in the judgments of Cotton and Bowen, L.JJ., in *Scott* v. *Pape*, *ubi sup.*

[2] *See Andrews* v. *Waite*, *ubi sup.*, and *infra*.

[3] *Per* Cotton, L.J., 31 Ch. D. at p. 570. *See* also the observations of Bowen, L.J., *ibid.* at p. 574.

[4] *Ibid.* at p. 576.

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"plaintiff's case by reason of his change in the building, then "undoubtedly his right may be lost by the change which he "has himself caused."

"But where the new building does use the same light, "avails itself of the same access of light as the old, where "there has been no intention of abandonment, and where "there has been no loss of evidence and no incapacity "to prove the identity of the old light and that which has "been interfered with, all of which circumstances in my "judgment occur in the present case, then I see nothing in "the statute to deprive the owner of the new building of the "right to the access of light which existed in the old "building."

Greenwood v. *Hornsey*.

In *Greenwood* v. *Hornsey*[1] the defendant had altered the dominant tenement by removing his old building containing ancient windows and substituting a new building in which the windows were so arranged as to preserve the light which had been enjoyed in respect of the old windows. The new building was rather higher than the old, and its front was advanced about two feet beyond the line occupied by the front of the old building.

It was held on the authority of *Scott* v. *Pape*[2] that the plaintiff was entitled to an injunction restraining the defendant from building in such a way as to obstruct the access of light and air to the new windows.

Pendarves v. *Munro*.

In *Pendarves* v. *Munro*,[3] where a new building had been erected on the site of an ancient building, it was decided on facts very similar to those in *Fowlers* v. *Walker*,[4] that by reason of the failure to keep any plan or other evidence necessary to shew the substantial identity of the new windows with the old, the plaintiffs were not entitled to an interlocutory injunction restraining the defendant from building so as to obstruct the access of light to the plaintiff's premises.

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[1] (1886) 33 Ch. D., 471; 55 L. T., 135.

[2] *Ubi sup.*

[3] (1892) 1 Ch., 611.

[4] (1881) 51 L. J. Ch., 443, *see supra*.

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Smith v. *Baxter*.

In *Smith* v. *Baxter*[1] the dominant building had been pulled down and rebuilt during the period of acquisition of an easement of light under the Prescription Act, but at the date of the action more than twenty years had elapsed since the original building had been erected. Portions of three windows in the new building coincided with substantial portions of three of the old windows, and there was a new skylight, the area of which was larger than the combined area of three old skylights, but which gave access to substantially the same quantity of useful light. It was held, in reliance on a passage in the judgment of Cotton, L.J., in *Scott* v. *Pape*,[2] that the growing right in respect of the windows and skylight had not been lost by the rebuilding, and that in the circumstances evidence of the plaintiff's intention to preserve ancient lights upon the rebuilding, though admissible, was unnecessary.

Colls v. *Home and Colonial Stores, Ltd.*

In *Colls* v. *Home and Colonial Stores, Limited*,[3] though the main question for decision was not one of forfeiture, but the extent of an acquired right to light; the question of forfeiture was incidentally noticed in the judgments of Lords Davey and Lindley.

Lord Davey says[4]: "The easement is for access of light "to the building, and if the building retains its substantial "identity, or if the ancient lights retain their substantial "identity, it does not seem to me to depend on the use which "is made of the chambers in it, or to be varied by any altera- "tion which may be made in the internal structure of it."

"I do not propose to discuss at length the question how "far a variation in a tenement will destroy an easement "appurtenant to it. The law on that subject is as old as "*Luttrel's case*."[5]

"In the case of *Martin* v. *Goble*[6] a malthouse had been "converted into a workhouse, and it was held that the house "was entitled to the degree of light necessary for a malthouse,

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[1] (1900) 2 Ch., 138.
[2] *Ubi sup.* at p. 567.
[3] (1904) App. Cas., 179.
[4] *Ibid.* at p. 202.
[5] (1738) 4 Rep., 86*a*.
[6] (1808) 1 Camp., 320.

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"not for a dwelling-house. That case has been the subject "of much criticism, and I think that some judges have "thought that the language of the Lord Chief Baron had "a wider scope than it was intended to have. Following the "suggestion of Wood, V.C.,[1] it may be supported on the "ground that (to use the language of *Luttrel's case*[2]) the altera- "tion affected the substance and not only the quality of the "tenement."

Lord Lindley says[3]: "The purpose for which a person "may desire to use a particular room or building in future "does not either enlarge or diminish the easement which he "has acquired. If he chooses in future to use a well-lighted "room or building for a lumber-room for which little light is "required, he does not lose his right to use the same room or "building for some other purpose for which more light is "required. *Aynsley* v. *Glover*[4] is in accordance with this "view. But if a room or building has been so built as to "be badly lighted, the owner or occupier cannot by enlarging "the windows or altering the purpose for which he uses it "increase the burthen on the servient tenement. *Martin* v. "*Goble*,[5] where a malthouse was turned into a workhouse, "may, I think, be upheld on this principle; and the observa- "tions of Wood, V.C., on *Martin* v. *Goble* in *Dent* v. *Auction* "*Mart Company*,[6] support this view."

Ankerson v. *Connelly*.

Ankerson v. *Connelly*[7] is an interesting and instructive case as shewing that since the decision in *Colls* v. *Home and Colonial Stores, Limited*,[8] the effect of materially decreasing ancient lights is to increase the burthen on the servient tenement, and that after such alteration the dominant owner cannot complain of any interference with the residue of the ancient lights which before the alteration would not, according to the rule in *Colls'*

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[1] In *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238.

[2] *Ubi sup.*

[3] (1904) App. Cas. at p. 211.

[4] (1874) L. R., 18 Eq., 544; L. R., 10 Ch. App., 283.

[5] *Ubi sup.*

[6] *Ubi sup.*

[7] (1907) 1 Ch., 678 (C.A.).

[8] (1904) App. Cas., 179, *see supra*, pp. 478, 479, and Chap. III, Part I.

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case, have amounted to a nuisance; and further, that an aperture which before the alteration was of no importance, will not after the alteration be entitled to protection because it has then become important to the new building.

In the case under notice the defendant had pulled down the dominant tenement, consisting of a small house and shed, and rebuilt upon the site and upon some adjoining land a much larger building. In so doing he destroyed at least three-fourths of his ancient lights.

The plaintiffs having put up hoardings so as to block up the remaining apertures, the defendant pulled them down, and the plaintiffs thereupon brought this action against him for a declaration that he was not entitled to any easement over their land for light and air in respect of any of the said remaining apertures or otherwise.

Warrington, J., held that the defendant had materially increased the burthen on the plaintiffs' land, and by his own conduct had precluded himself from maintaining an action for damages or an injunction, and that the plaintiffs were entitled to the declaration they asked for, omitting the words "or otherwise."[1]

This decision was affirmed on the facts by the Court of Appeal.

Cozens-Hardy, M.R., said[2]: "In my view this case really "does not involve the very serious and important question of "law which Mr. Cave has invited us to deal with. I think "that the learned judge, in spite of one or two sentences in "his judgment with which I do not quite agree, really intended "to decide as a matter of fact that the reconstruction and "change in character of the building had so destroyed the "ancient lights and the nature of the house to which they "belonged in its original state that the blocking up recently "effected by the plaintiffs' hoardings was not of such a "nature as to entitle the defendant to an injunction against "the interference with any of his ancient lights."

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[1] (1906) 2 Ch., 544.

[2] (1907) 1 Ch. at p. 682.

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Dealing with the defendant's contention that notwithstanding his blocking up of the ancient lights from some quarters he was still entitled to light from the remaining quarters, the Master of the Rolls points out that before the decision in *Colls' case* such contention would undoubtedly have prevailed, but that since that decision it was no longer sufficient for a plaintiff to say, "Oh, you are depriving me of "a portion of light, and a portion of light which is so "obviously important to me—because it is the only light "which I by acts of my own have chosen to leave to my "premises—that I am entitled to an injunction."

After referring in this connection to Lord Davey's observations in *Colls' case*,[1] and stating the facts as to the original condition of the defendant's premises and the effect of the rebuilding, the Master of the Rolls continues—

"Now, looking at the old house and the new structure, "I feel very great difficulty in saying that there is any sub-"stantial identity between the old building and the new which "will entitle the defendant to the protection of the Court. . . . "It seems to me that when the defendant by his own act has "blocked out practically the whole of the light which the "room had before, it does almost necessarily and inevitably "follow that the obstruction (even the complete obstruction) "of the small remnant of light which remained would not by "itself have been an actionable wrong in respect of the old "light to the premises, and this, I think, is the view which "the learned judge really took. I do not imagine for a "moment that the learned judge intended to lay down the "general proposition that any alteration by a house owner of "part of the lights which light his house, by blocking up "a window, or something of that kind, is an abandonment or "destruction of all his rights in respect to the residue of the "ancient lights. No such idea was, I believe, in the learned "judge's mind, and certainly, in so far as I think this appeal "ought to be dismissed, it must not be understood that,

[1] *See* these set out *verbatim supra*, pp. 575, 576.

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"speaking for myself, I intend to give any support whatever "to that view. But, dealing with a case like this, I think "the learned judge was right in saying that what the "defendant had done had substantially destroyed all the "lights in the house and that it was a case of de minimis "which was left."

In reference to a new light which had been opened in the new building in the place of a small window which before the rebuilding had existed in the top of a lean-to shed which nowhere else was glazed and had ample light from the whole of its open front, the Master of the Rolls, after indicating that since *Colls' case* no action could have been maintained in respect of the blocking up the old light in the old shed, continues—

"What the defendant has done is that he has made a great "warehouse, and he has replaced in the position of this old "shed window a new light which undoubtedly may be of more "importance to the new building than the old light was to "the old shed; but there again I am not prepared to say "that the learned judge was otherwise than perfectly right "in the view which he took, that, when a man having an "out-house or shed with a light which would not be entitled "to the protection of the Court as the law now stands chooses "to erect upon it a fine house and put a new window in that "place, he is not entitled thus to increase the burden which "he has imposed upon his neighbour the owner of the servient "tenement."

In *Andrews* v. *Waite*,[1] prior to the alteration which was effected during the period of prescription, light had come to the plaintiff's building over the roof of higher buildings at an angle, and after the alteration a substantial part of the same light was intercepted by the new apertures which, by reason of the old wall having been advanced, were, respectively, an extension of, and in a higher plane to, the old apertures. *Andrews v. Waite.*

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[1] (1907) 2 Ch., 500.

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After the alteration the building remained substantially unchanged in character and the light was put to the same use as before.

It was held (following *Scott* v. *Pape*,[1] and explaining that the main decision in that case upon the question of abandonment or forfeiture had not been touched by the decision in *Colls' case*[2]) that the growing right to light had not been lost, since no alteration of a building, which would not involve the loss of a right to light when indefeasibly acquired, will, if made during the currency of the statutory period, prevent the acquisition of the right.

In accordance with the principle underlying all the modern decisions since *Tapling* v. *Jones*,[3] and notably elucidated in *Scott* v. *Pape*,[4] the decision in *Andrews* v. *Waite*[5] makes it clear that the question now to be determined in all cases relating to the forfeiture of either the growing or the indefeasible right to light by the alteration of the dominant building, is not the identity of the aperture through which the light claimed has had access to the dominant building, but the identity of the light itself.

"I think the real test is identity of light, and not identity "of aperture or entrance for the light."[6]

Indian decisions.

The Indian decisions on the question of forfeiture of negative easements by a permanent alteration of the dominant tenement are scanty, but, with one exception, so far as they go, they substantially follow the established English principles, which, founded as they are on reason, justice, and common-sense, will doubtless continue to receive the recognition of the Indian Courts.

Kalee Dass Banerjee v. *Bhoobun Mohun Dass.*

In *Kalee Dass Banerjee* v. *Bhoobun Mohun Dass*,[7] the decision that where a man pulls down a house and builds another on the same ground, his right to light and air enjoyed

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[1] (1886) 31 Ch. D., 554.
[2] *Ubi sup.*
[3] (1865) 11 H. L. C., 290, *see supra*, p. 566.
[4] (1886) 31 Ch. D., 554, *see supra*, p. 572.
[5] *Ubi sup.*
[6] *Per* Neville, J., in *Andrews* v. *Waite* (1907), 2 Ch. at p. 510.
[7] (1873) 20 W. R., 185.

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in respect of the old house *ipso facto* disappears, is contrary to established principles, and cannot now be relied on.[1]

Provabutty Dabee v. *Mohendro Lall Bose*[2] deals merely with the question of enlargement and the servient owner's limited power of obstruction, and follows *Tapling* v. *Jones*.[3] *Provabutty Dabee* v. *Mohendro Lall Bose.*

In *Caspersz* v. *Raj Kumar*[4] it is laid down that the pulling down of the old house and the building of a new one does not of itself extinguish the easement, and that the real question to be determined is whether by reason of the alteration a different and greater burthen has been imposed on the servient tenement. *Caspersz* v. *Raj Kumar.*

(2) *Other Negative Easements.*

With reference to easements other than easements of light, it may be stated as a general proposition that any alteration of the dominant tenement which has the effect of throwing a materially increased burthen on the servient tenement will cause a forfeiture of the right. If, on the other hand, the alteration of the dominant tenement does not materially increase the burthen on the servient tenement, the right is not affected.

Easements in water.

In *Luttrel's case*[5] the plaintiffs contended that the defendants by pulling down their fulling-mills and erecting grist-mills in their place had destroyed their prescription and accordingly had no right to use for their grist-mills the water-courses which they had formerly used for their fulling-mills. But it was resolved "that the mill is the substance and thing "to be demanded, and the addition of grist, or fulling, are but "to shew the quality or nature of the mill, and therefore if "the plaintiff had prescribed to have the said watercourse to "his mill generally (as he well might), then the case would "be without question, that he might alter the mill into what "nature of a mill he pleased, provided always that no prejudice *Luttrel's case.*

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[1] *See* the proposition first above stated, and the cases cited in support, *supra*, p. 562.

[2] (1881) I. L. R., 7 Cal., 453.

[3] *Ubi sup.*

[4] (1898) 3 Cal. W. N., 28.

[5] (1738) 4 Rep., 86*a*.

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"should thereby arise, either by diverting or stopping of the "water, as it was before, and it should be intended that the "grant to have the watercourse was before the building of "the mills, for nobody will build a mill before he is sure to "have water, and then the grant of a watercourse being "generally to his mill, he may alter the quality of the mill "at his pleasure, as is aforesaid."

Saunders v. *Newman.*

To the same effect is the decision in *Saunders* v. *Newman*,[1] where it was held that an alteration in the size of a mill-wheel did not cause a forfeiture of the right to the use of water for the purposes of a mill, provided such alteration did not prejudice the right of the owner of the lower mill, for to hold that the owner of a mill was bound to use water in the same precise manner or to apply it to the same mill would be to stop all improvements in machinery.

Thomas v. *Thomas.*

The principle was the same in *Thomas* v. *Thomas*.[2] There the plaintiff, who had the right to have the rain-water drip from the roof of his house on to the defendant's land, raised the wall and increased the projection from which the dripping took place. Upon this the defendant erected a wall to prevent any water dripping on to his land, and an action being brought against him for disturbance of the easement, there was a verdict in favour of the plaintiff.

Hall v. *Swift.*

In *Hall* v. *Swift*[3] the plaintiff had the right of enjoyment of a certain stream which, flowing from springs rising in the defendant's field, flowed in an underground course or drain to a spout in the defendant's hedge whence, after running a few yards down a lane, it crossed to the plaintiff's land.

The plaintiff altered the course of the stream in such a way as to make it flow from the spout in the hedge to his land.

The plaintiff having brought an action for the obstruction of the stream on the defendant's land whereby the supply of water to his land had been entirely stopped, it was objected

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[1] (1818) 1 B. & Ald., 258.
[2] (1835) 2 C. M. & R., 34.
[3] (1838) 6 Scott, 167; 4 Bing. N. C. 381; 44 R. R., 728.

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by the defendant that the plaintiff's alteration of the course of the stream had destroyed his former right. This objection was rejected by Tindal, C.J., in the following words: "I agree, "that, if the course of the water had been set out or described "by metes and bounds, a variance between the statement and "the proof might have been fatal. But here the right is "described generally. If such an objection as this were "allowed to prevail, any right, however ancient, might be lost "by the most minute alteration in the mode of enjoyment: "the making straight a crooked bank or footpath would have "this result. No authority has been cited, nor am I aware "of any principle of law or common-sense upon which such "an argument can base itself."

Easements of support.

As regards easements of support, though it is undoubted that the pulling down of the dominant tenement and the substitution of an entirely different building in its place will result in an extinction of the right of support formerly enjoyed in respect of the old building, there appears to be no authority for the conclusion that if the dominant tenement continues to stand but is so altered that the original limits of the easement are exceeded by an additional weight being imposed on the servient tenement, that circumstance of itself will cause an extinction of the easement by forfeiture.

There is, of course, express authority for the proposition that if an additional weight is imposed for which no right of support has been acquired and the injury caused to the dominant tenement by excavation or other act on the servient tenement would not have happened but for the imposition of the additional weight, no action is maintainable for the injury.[1]

But the Courts have not in any reported decision gone so far as to hold that the servient owner would not be liable if it could be shewn that the injury would have been caused to the dominant tenement notwithstanding the imposition of the additional weight.

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[1] *See Dodd* v. *Holme* (1834), 1 A. & E., 493; *Partridge* v. *Scott* (1838), 3 M. & W., 220; and the treatment of this subject in Chap. III, Part IV.

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Indeed, the authorities already considered in relation to this subject point to the opposite conclusion.[1]

II.—Under the Indian Easements Act.

Section 43.

The provisions of this enactment in relation to forfeiture are contained in section 43. That section provides as follows:—

"Where, by any permanent change in the dominant "heritage, the burden on the servient heritage is materially "increased and cannot be reduced by the servient owner "without interfering with the lawful enjoyment of the ease- "ment, the easement is extinguished, unless—

"(*a*) it was intended for the beneficial enjoyment of the "dominant heritage, to whatever extent the ease- "ment should be used; or

"(*b*) the injury caused to the servient owner by the "change is so slight that no reasonable person "would complain of it; or

"(*c*) the easement is an easement of necessity."

"Nothing in this section shall be deemed to apply to an "easement entitling the dominant owner to support of the "dominant heritage."

Construction of.

Clause (*a*) of the section is not as clear or as comprehensive as it might be.

It was apparently intended to reproduce the principles laid down in *Tapling* v. *Jones*[2] (subsequently extended by *Scott* v. *Pape*[3]), but in so far as it requires to be read with section 28, clause (*c*),[4] it would appear to be at variance with the decisions in *Colls* v. *Home and Colonial Stores, Limited*,[5] and *Ankerson* v. *Connelly*,[6] though the variation may to some

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[1] *See Brown* v. *Robins* (1889), 28 L. J. Exch., 250; *Stroyan* v. *Knowles* (1861), 6 H. & N., 454; 30 L. J. Exch., 102; and Chap. V, Part IV.

[2] (1865) 11 H. L. C., 290; and *see supra*, D, I (*b*), (1).

[3] (1886) 31 Ch. D., 554; and *see supra*, D, I (*b*), (1).

[4] *See* App. VII, and the comments on the section in Chap. III, Part I.

[5] (1904) App. Cas., 179; and *see supra*, D, I (*b*), (1).

[6] (1907) 1 Ch., 678; and *see supra*, D, I (*b*), (1).

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extent be modified by the provisions of section 33, Expl. II, and section 35 (*a*).[1]

Nevertheless, the construction of the Act as regards the extent to which an adjoining landowner is at liberty to obstruct ancient lights is a matter of considerable doubt and difficulty, and must so remain until it has been finally determined by judicial authority or legislative enactment.[2]

Clause (*b*) of the section is clearly redundant by virtue of the use of the word "*materially*" in the first paragraph.

Clause (*c*) and the last paragraph reproduce the general law.[3]

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[1] *See* App. VII, and Chap. III, Part I.

[2] *See* further Chap. III, Part I.

[3] As to easements of necessity, *see* Chap. X, Part I (*d*); and as to easements of support, *see supra*, D, I (*b*), (2).

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CHAPTER X.

Extinction of Easements (*continued*), Suspension and Revival of Easements.

Part I.—Extinction of Easements by Miscellaneous Methods.

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Part II.—Suspension and Revival of Easements.

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Part I.—Extinction of easements by miscellaneous methods.

There still remain to be enumerated certain miscellaneous methods of extinction which, obvious in themselves, hardly require more than passing notice.

They are the following:—

(*a*) *Extinction by dissolution of right of servient owner.*

Section 37 of the Indian Easements Act provides that when, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to

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have any right in the servient tenement, the easement is extinguished.[1]

By virtue of the exception to the same section, such provision does not apply to an easement lawfully imposed by a mortgagor in accordance with section 10.[2]

(b) Extinction by revocation.

By section 39 of the Indian Easements Act an easement is extinguished when the servient owner, in exercise of a power reserved in that behalf, revokes the easement.[3] I. E. Act, s. 39.

(c) Extinction of limited easements.

An easement acquired for a limited period is extinguished by the completion of such period.[4]

Similarly, an easement which is acquired subject to an express,[5] or implied, condition[6] is extinguished by the fulfilment of the condition.

Thus, where an easement passed by implication of law to a lessee on a lease to him of the dominant tenement for a period of twenty-one years subject to a condition of re-entry by the lessor, it was held, that on determination of the lease under such condition and recovery of possession by the lessor's vendee, the easement was extinguished.[7]

So an easement created for a particular object is extinguished when the object of its existence ceases.

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[1] *See* App. VII. Illustration (*a*) to the section provides an example of a condition subsequent on the happening of which the interest of the servient owner in the servient tenement determines. Illustrations (*b*) and (*c*) demonstrate the extinguishment of an easement upon the cesser of a limited interest (such as a tenancy) in the servient tenement to the extent of which the easement could be imposed, *cf.* s. 8, ills. (*a*), (*b*), and (*d*).

[2] *See* App. VII. Subject to the mortgage the mortgagor is absolute owner and can impose any easement on the mortgaged property which does not diminish the security. Such easement is not, therefore, extinguished upon an alienation of the mortgaged property.

[3] *See* App. VII.

[4] *Lord Dynevor* v. *Tennant* (1886), 32 Ch. D., 375; 55 L. J. Ch., 817; I. E. Act, s. 40, *see* App. VII.

[5] I. E. Act, s. 40, *see* App. VII.

[6] *Beddington* v. *Atlee* (1887), 35 Ch. D., 317; 56 L. J. Ch., 655.

[7] *Beddington* v. *Atlee*, *ubi sup.*

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Thus, an easement to take water for the purpose of filling a canal ceases when the canal no longer exists.[1]

(d) *Extinction of easements of necessity.*

An easement of necessity is extinguished neither by alteration of the dominant tenement[2] nor by non-user,[3] but only by the disappearance of the necessity.

This is almost a self-evident proposition and scarcely needs authority to support it.

Holmes v. Goring.

Holmes v. *Goring*[4] shews that a way of necessity is limited by the necessity which creates it, and that if subsequently to the acquisition of the easement it becomes possible for the dominant owner to reach the same point by another way over his own land, the way of necessity ceases.

To the same effect is section 41 of the Indian Easements Act.[5]

(e) *Extinction of useless easements.*

I. E. Act, s. 42.

Under section 42 of the Indian Easements Act an easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.[6]

(f) *Extinction on permanent alteration of servient tenement by superior force.*

I. E. Act, s. 44.

According to section 44 of the Indian Easements Act an easement is extinguished where the servient tenement is so permanently altered by superior force that the dominant owner can no longer enjoy it.[7]

The illustrations to the section explain its application. A river changing its course permanently from the servient

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[1] *National Guaranteed Manure Co.* v. *Donald* (1859), 4 H. & N., 8.

[2] *See* I. E. Act, s. 43, cl. (*c*), App. VII.

[3] *See* I. E. Act, s. 47, App. VII.

[4] (1824) 2 Bing., 76.

[5] *See* App. VII.

[6] *See* App. VII.

[7] *See* App. VII.

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owner's land to another's will extinguish the dominant owner's right to fish in it.[1]

And if a path over which there is a right of way is permanently destroyed by an earthquake, the easement is extinguished.[2]

If the way destroyed is a way of necessity, the dominant owner has the right to another, and if the servient owner fails to set it out, he may do so himself.[3]

Under the general law.

These provisions are substantially in accord with the English law. In the English decisions a distinction is drawn between the case where the substance of the road has been annihilated by the act of God, or some extraordinary accident, and where it has been merely obstructed, either permanently or temporarily. In the former case the easement is treated as extinguished by virtue of the parish or local authority being relieved *ex necessitate rei* from all liability to restore or repair a road which is no longer in existence.[4]

In the latter case, where the Court can draw an inference of fact that there is no proof of the road having been so destroyed as to be beyond all possibility or commercial practicability of repair, the easement is not extinguished but is merely suspended until the road has been repaired.[5]

(*g*) *Extinction by destruction of either tenement.*

An easement is extinguished when either the dominant or servient tenement is completely destroyed.[6]

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[1] Ill. (*a*).

[2] Ill. (*b*).

[3] S. 44, second para., and *see* s. 14, and App. VII, and *supra*, Chap. VIII, Part I, B (3).

[4] *Reg.* v. *Inhabitants of Horusea* (1854), 1 Dears. C. C., 291; 23 L. J. M. C., 59; *Reg.* v. *Inhabitants of Greenhow* (1876), 1 Q. B. D., 703; 45 L. J. M. C., 141. As where the road has been swept away and occupied by the sea, *Ibid.*

[5] As where by reason of a landslip or other accident a road becomes impassable and it is possible and practicable to restore it along its old track, the liability to repair remains, *Reg.* v. *Inhabitants of Greenhow*, *ubi sup.*; *Guardians of Amesbury* v. *Justices of Wilts* (1883), 10 Q. B. D., 480. And the same rule is applicable to a temporary obstruction, *e.g.* such as that caused by snow, *Guardians of Amesbury* v. *Justices of Wilts*, *ubi sup.* These were cases of public ways, but the rule appears to apply equally to a private way, *see* Goddard on Easements, 6th Ed., p. 421.

[6] I. E. Act, s. 45, *see* App. VII.

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Thus, if the servient tenement consisted of a strip of land on the sea-shore, a permanent encroachment of the sea to the extent of the strip, would put an end to any easement existing over it.[1]

(*h*) *Extinction of accessory easements.*

If the principal easement ceases, the accessory easement must also come to an end.[2]

Thus, if a man has the right to work minerals, and the minerals are exhausted, the accessory easement of way over the servient tenement for the purpose of removing the minerals is extinguished.

Part II.—Suspension and Revival of Easements.

General principles.

It has been seen that unity of seisin for an equally perdurable estate accompanied by unity of possession and enjoyment will extinguish an easement.[3]

Unity of possession, therefore, or any other combination of interests in the same person falling short of the above requirements, does not cause the extinction of an easement but its suspension.[4]

Thomas v. *Thomas.*

As Alderson, B., said in *Thomas* v. *Thomas*[5]: "If I am "seized of freehold premises, and possessed of leasehold "premises adjoining and there has formerly been an easement "enjoyed by the occupiers of the one as against the occupiers "of the other, while the premises are in my hands, the ease- "ment is necessarily suspended, but it is not extinguished, "because there is no unity of seisin; and if I part with the "premises, the right not being extinguished, will revive."

Upon a severance of the tenements the easement, whether

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[1] Illustration to s. 45. The principle of this section and of s. 44 (*ubi sup.*) is the same, but the illustration to s. 45 would seem more appropriate to s. 44.

[2] I. E. Act, s. 48, and illustration, *see* App. VII.

[3] *See* Chap. IX, Part II, A.

[4] *Thomas* v. *Thomas* (1835), 2 Cr., M. & Ros., 34; *Modhoosoodun Dey* v. *Bissonauth Dey* (1875), 15 B. L. R., 361; *Richardson* v. *Graham* (1908), 1 K. B., 39; I. E. Act, s. 49, App. VII.

[5] *Ubi sup.* at p. 41.

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it be an easement of necessity or any other kind of easement, revives.[1]

Section 51 of the Indian Easements Act deals with various methods of revival.[2] I. E. Act, s. 51.

They may be classified as follows:—

(1) Revival of an easement extinguished under section 45[3] by restoration within twenty years of the dominant or servient tenement through the process of alluvion—cl. (*a*).

(2) Revival of an easement extinguished under the same section by the servient tenement on the same site within twenty years—cl. (*b*).

(3) Revival of an easement extinguished under the same section by the rebuilding of the dominant tenement on the same site within twenty years in such a manner as not to impose a greater burthen on the servient tenement—cl. (*c*).

(4) Revival of an easement extinguished under section 46[4] by the setting aside by a decree of a competent Court of the grant or devise by which the unity of ownership was produced.

(5) Revival of easement of necessity when the unity of ownership ceases from any other cause.

This, strictly speaking, is hardly in accord with the English view which prefers the notion of a fresh creation after extinction by unity of seisin to that of a revival.[5]

(6) Revival of a suspended easement if the cause of suspension is removed before the right is extinguished by non-user under section 47.[6]

Under this paragraph an easement which has been suspended by unity of possession revives.[7]

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[1] *Thomas* v. *Thomas* (1835), *ubi sup.*; Gale on Easements, 8th Ed., pp. 516, 517; I. E. Act, s. 51, last para., App. VII.

[2] *See* App. VII.

[3] *Ubi sup.*

[4] *See* App. VII, and Chap. IX, Part II, A.

[5] *See Holmes* v. *Goring* (1824), 2 Bing., 76, and Chap. IX, Part II, A.

[6] As to this method of extinction, *see* Chap. IX, Part II, C, II (*b*).

[7] *See* illustration to the section, App. VII.

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I. E. Act, s. 50.

Section 50 of the Indian Easements Act provides that the servient owner has no right to require that an easement shall be continued.[1]

Compensation on discontinuance of easement.

Further, it negatives any right on his part, notwithstanding the provisions of section 26,[2] to demand compensation for damage caused by the extinguishment or suspension of the easement if the dominant owner has given him such notice as will enable him, without unreasonable expense, to protect the servient tenement from such damage. Where such notice has not been given, the servient owner will be entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

In respect of the duty to give notice and the right to compensation in default thereof the section deviates from the English law as laid down in *Mason* v. *The Shrewsbury and Hereford Railway Company*.[3]

The illustration to the section appears to have been framed on the facts of that case.

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[1] *See* App. VII and this subject considered in Chap. II and Chap. III, Part III, A.

[2] This section provides for the dominant owner's liability for compensation arising from his failure to repair an artificial work on the servient tenement by means of which the easement is enjoyed; *see* App. VII and Chap. VIII, Part III.

[3] (1871) L. R., 6 Q. B., 578. *See* the passage from this case set out in Chap. II.

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CHAPTER XI.

Disturbance of Easements and the Legal Remedies therefor.

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Part I.—General Principles relating to the Disturbance of Easements.

In previous chapters the *rights* of dominant owners in relation to the extent and mode of enjoyment of easements have been dealt with.[1]

In the present chapter it is proposed to consider the *remedies* which the law provides for the wrongful obstruction of those rights.

The determination of the question as to what amounts to a wrongful obstruction and how such obstruction is to be remedied depends mainly on the application of general principles, though there are certain rules which apply specially to particular easements, and these will be separately considered.

For the purposes of the present subject the disturbance of an easement must be taken to refer to some act done on the servient tenement either by the servient owner or occupier, or by a licensee of the servient owner, or by a trespasser, since, an easement being a right *in rem*, whoever creates the disturbance is liable therefor to the injured party.

The following matters have accordingly to be considered:—

(1) The nature of the disturbance or wrongful obstruction for which the law provides a remedy.

(2) The nature of the remedy open to the injured party.

In answer to the first question as to what will constitute an actionable disturbance, it may be stated generally— Disturbance, what is.

First.—The law does not concern itself with an obstruction which is trivial or immaterial.[2] *De minimis non curat lex.*

Secondly.—The law takes no note of an obstruction which finds its origin in the caprice or sentiment of the aggrieved party, or in any peculiarity of health or temperament.[3]

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[1] Chaps. III, IV, VIII.

[2] The corollary of this proposition is the third below stated; *see* the authorities referred to in that connection.

[3] *See* Gale on Easements, 8th Ed., p. 570.

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Substantial damage.

Thirdly.—In order to amount to a disturbance the act or acts complained of must have caused substantial damage.[1]

Fourthly. — The condition of substantial damage is satisfied—

(*a*) As regards easements of light and air, by any obstruction which materially affects the comfortable or beneficial use or enjoyment of the dominant tenement or lessens its selling or letting value[2];

(*b*) As regards easements of way and easements in water, by any obstruction or other act which materially interferes with the lawful enjoyment of the easement[3];

(*c*) As regards easements of support by a withdrawal of support which substantially injures the dominant tenement[4]; and

(*d*) Generally, by any invasion of the legal right from which substantial damage will be presumed.[5]

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[1] *See* the cases cited in support of the fourth proposition; and I. E. Act, s. 33, first para., App. VII.

[2] *Back* v. *Stacey* (1826), 2 C. & P., 465; 31 R. R., 679; *Parker* v. *Smith* (1832), 5 C. & P., 438; 38 R. R., 828; *Pringle* v. *Wernham* (1836), 7 C. & P., 377; *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Kelk* v. *Pearson* (1871), L. R., 6 Ch. App., 809; *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App., 212; *Modhoosoodun Dey* v. *Bissonauth Dey* (1875), 15 B. L. R., 361; *Jamnadas* v. *Atmaram* (1877), I. L. R., 2 Bom., 133; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179; *Kine* v. *Jolly* (1905), 1 Ch., 480, 502, 503; (1907) App. Cas., 1; *Higgins* v. *Betts* (1905), 2 Ch., 210; *Anderson* v. *Hardut Roy Chamaria* (1905), 9 Cal. W. N., 543; *Ankerson* v. *Connelly* (1906), 2 Ch., 544; (1907) 1 Ch., 678; I. E. Act, s. 33, Expl. II and III, App. VII.

[3] As to easements of way, *see* 2 Roll. Abr. Nusans G. pl. 1; *Clifford* v. *Hoare* (1874), L. R., 9 C. P., 362; *Toolseemoney Dabee* v. *Jogesh Chunder Shaha* (1877), 1 Cal. L. R., 425; *Nicol* v. *Beaumont* (1884), 50 L. T., 112. As to easements in water, *see* Gale, 8th Ed., p. 570; *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46; *Kali Kissen Tagore* v. *Jodoo Lall Mullick* (1879), 5 Cal. L. R. (P. C.), 97; L. R., 6 Ind. App., 190.

[4] *See* the cases cited in note 1 to p. 134, *supra*, and *Smith* v. *Thackerah* (1866), L. R., 1 C. P., 564; *Jones* v. *Pritchard* (1908), 1 Ch., 630, 637; 24 Times L. R., 309, 310; I. E. Act, s. 34, App. VII.

[5] Note to *Mellor* v. *Spateman*, 1 Wms. Saund., 346*b*; 1 Notes to Saund., 626; *Bower* v. *Hill* (1835), 1 Bing. N. C., 549

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The principles that apply to the disturbance of principal easements apply also to the disturbance of accessory easements.[1] Disturbance of accessory easements.

When the disturbance of an easement is attributable to the collective acts of a number of persons the damage caused thereby must be taken in the aggregate; so that none of such persons can sever in his defence from the others and plead that the damage caused by himself is inappreciable.[2] Disturbance by collective acts.

The law is clearly stated in *Thorpe* v. *Brumfitt*[3] by James, L.J., who says: "Then it was said that the plaintiff alleges *Thorpe* v. *Brumfitt.*

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(555); 1 Scott., 526 (534); *Harrop* v. *Hirst* (1868), L. R., 4 Exch., 43; *Atty.-Genl.* v. *Conduit Colliery Co.* (1895), 1 Q. B. at pp. 310 *et seq.*; and *see* the cases cited in note 3 to p. 256, *supra*, and I. E. Act, s. 33, Expl. I, App. VII. In *Harrop* v. *Hirst*, *ubi sup.*, the plaintiffs, together with other inhabitants of a certain district, had been accustomed to enjoy the use of water from a certain spout in a highway for domestic purposes. The defendant abstracted water in such quantities from the stream from which the spout was supplied as to render what water remained insufficient for the requirements of the district. It was held that, though there was no proof of personal or particular actual damage, the action was maintainable upon the principle that the act of the defendant, if repeated, might furnish evidence of a right in derogation of the plaintiffs' right. Kelly, C.B., observed: "It is conceded that any inhabitant who had "suffered actual damage from want of "water could maintain an action for the "injury done him. But that actual "damage is not in such a case a necessary ingredient, is established by the "passage cited by my Brother Martin "from 1 Wms. Saunders, 346 (*a*) in the "note to *Mellor* v. *Spateman*, where it "is laid down that a commoner may "have an action on the case without "proving any *specific injury* to himself "against a person wrongfully depasturing "cattle on the common, and the author "observes: 'The law considers that the "'*right* of the commoner is injured by "'such an act, and therefore allows him "'to bring an action for it to prevent a "'wrong-doer from gaining a right by "'repeated acts of encroachment. For "'wherever any act injures another's "'right, and would be evidence in future "'in favour of the wrong-doer, an action "'may be maintained for an invasion of "'the right without proof of any specific "'injury.' The proposition there laid "down amounts to this, that whenever "one man does an act which, if repeated, "would operate in derogation of the right "of another, he is liable to an action "without particular damage at the suit of "a person whose right may be affected." On the same principle, where a right to support exists, an action is maintainable for a removal of the support causing substantial subsidence even though unaccompanied by proved pecuniary damage, *Atty.-Genl.* v. *Conduit Colliery Co.*, *ubi sup.*

[1] *See* Chap. VIII, Part II, and I. E. Act, s. 33; Gale on Easements, 8th Ed., p. 507.

[2] *Thorpe* v. *Brumfitt* (1873), L. R., 8 Ch. App., 650; *Chunder Coomar Mookerji* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665; *Lambton* v. *Mellish* (1894), 3 Ch. D., 163.

[3] *Ubi sup.* at p. 656.

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"an obstruction caused by several persons acting indepen-
"dently of each other, and does not shew what share each
"had in causing it. It is probably impossible for a person in
"the plaintiff's position to shew this. Nor do I think it
"necessary that he should shew it. The amount of obstruc-
"tion caused by any one of them might not, if it stood alone,
"be sufficient to give any ground of complaint, though the
"amount caused by them all may be a serious injury.
"Suppose one person leaves a wheel-barrow standing on a
"way, that may cause no appreciable inconvenience, but if
"a hundred do so, that may cause a serious inconvenience,
"which a person entitled to a use of the way has a right
"to prevent; and it is no defence to any one person among
"the hundred to say that what he does causes of itself no
"damage to the complainant."

Remedy against Government.

A remedy for disturbance exists as much against Government as against a private individual.[1]

Burthen of proof.

In a suit relating to the disturbance of an easement, it lies on the plaintiff to prove his title to the particular easement if the same is disputed.[2]

Classification of remedies.

The remedies for the disturbance of an easement may conveniently be classified as follows:—

(1) Remedy without the intervention of the Court, by act of the injured party abating the disturbance.

(2) Remedy with the intervention of the Court, by suit.

Part II.—Remedy of abatement by act of injured party.

In former times, a party injured by the disturbance of his easement was on occasion permitted by the law to obtain redress by his own act.[3]

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[1] *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6; *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (1878), I. L. R., 7 Bom., 209.

[2] *Onraet* v. *Kishen Soondaree Dossee* (1871), 15 W. R., 83; *Hari Mohun Thakoor* v. *Kissen Sundari* (1884), I. L. R., 11 Cal., 52. *See* also *Wright* v. *Howard* (1823), 1 Sim. & St., 190; 24 R. R., 169; *Khoda Bux* v. *Shaikh Tazaddin* (1894), 8 Cal. W. N., 359, and the cases cited in note 2 to p. 258, *supra*.

[3] *See* Gale on Easements, 8th Ed., pp. 576 *et seq*.

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Thus, in *Rex* v. *Rosewell*,[1] it was resolved: "If H builds a house so near him that it stops my light, or shoots the "water upon my house, or is in any other way a nuisance to "me, I may enter upon the owner's soil and pull it down." *Rex* v. *Rosewell*.

So in *Raikes* v. *Townsend*[2] it was held that, if a man in his own soil erects a thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by him for his cattle; the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass. *Raikes* v. *Townsend*.

But in modern times this method of redress has not found favour in England, as being one which is opposed to the spirit and principles of the English law. Not favoured in England in modern times.

Thus, in *Hyde* v. *Graham*,[3] Pollock, C.B., said: "No doubt in Blackstone's Commentaries some instances are "given where a person is allowed to obtain redress by his own "act, as well as by operation of law, but the occasions are "very few, and they might constantly lead to breaches of the "peace, for if a man has a right to remove a gate placed across "the land of another, he would have a right to do it even "though the owner was there and forbade him. The law of "England appears to me, both in spirit and on principle, to "prevent persons from redressing their grievances by their "own act." *Hyde* v. *Graham*.

So, too, in England, in former times, an individual might abate a public nuisance and, apparently, was not required to exercise the same degree of care as in a private nuisance.[4]

But here, again, the modern tendency has been to discourage abatement by individuals.[5]

In India, outside the Indian Easements Act, the remedy of abatement by the act of the injured party appears to have been recognised,[6] but it is expressly prohibited by the Indian In India apparently recognised outside I. E. Act. Rejected by I. E. Act.

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[1] (1699) Salkeld, 459.

[2] (1804) 2 Smith, 9.

[3] (1862) 1 H. & C. at p. 598. And *see* the observations in Goddard on Easements, 6th Ed., p. 501, citing *Hyde* v. *Graham*.

[4] Gale, *ubi sup.* at p. 578.

[5] *See Campbell Davys* v. *Lloyd* (1901), 2 Ch., 518.

[6] *Sheikh Monoour Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218; *Chunder Coomar Mookerji* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665 (673).

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Easements Act,[1] and appears to be open to at least as much objection in India generally as in England.[2]

Abatement how to be effected.

The abatement should be effected with reasonable care not to cause more damage than necessary.[3]

Demand previous to abatement is unnecessary except where the cause of disturbance cannot be removed without trespassing on the servient tenement,[4] and the tenement is in actual occupation of the owner,[5] so that an abatement without notice is likely to cause a breach of the peace, or where it has passed into new hands since the doing of the act causing the disturbance.[6]

And demand may also be made either on the lessor or lessee of the servient tenement.[7]

Part III.—Remedy by Suit.

If the injured party desires to obtain relief for the disturbance of an easement otherwise than by personal redress, he must seek the intervention of the Court by suit.

The first question, therefore, that arises is what persons are entitled to sue for the disturbance of an easement.

(1) *Who may Sue.*

Owner or occupier of dominant tenement.

Inasmuch as an easement is a right appurtenant to land, and a right *in rem*, the party in possession of the dominant tenement, whether as owner or occupier, may sue for the disturbance of the right, even though such disturbance is only of a temporary character.[8]

Reversioner, subject to certain conditions.

Further, under certain conditions, a reversioner of the dominant tenement may also maintain an action for the disturbance of an easement.

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[1] S. 36, *see* App. VII.

[2] As being an encouragement to riot and trespass, *see Gazette of India*, July to Dec., Part V, p. 478.

[3] *See* Gale on Easements, 8th Ed., p. 578, and *see supra*, p. 225 (*h*), note 5.

[4] Gale, *ubi sup.*

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.*

[8] *See* Gale, *ubi sup.* at p. 581; I. E. Act, ss. 4 and 32, App. VII; *Kundan* v. *Bidhi Chand* (1907), 29 All., 64.

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The fulfilment of these conditions depends on the nature of the act causing the disturbance, and the real foundation of the right to sue is some act either necessarily injurious to the reversion, or of so permanent a character as possibly to injure the reversion, by operating in denial of the right.[1]

Thus, the erection of a roof with eaves from which water was discharged through a spout on to the reversioner's premises,[2] the locking, chaining, and fastening of a gate across a way,[3] and the erection of a hoarding near windows whereby the light and air were prevented from entering and the house rendered unfit for habitation,[4] have all been held to be acts of disturbance for which a reversioner may sue.

But a single temporary act, such as a mere trespass consisting in another's entering upon the reversioner's land even though accompanied by a claim of right, does not give the reversioner a right of action.[5]

In *Bower* v. *Hill*[6] Tindall, C.J., said: "The right of the plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction, apparently permanent, to lights and other easements which belong to the premises: *Jesser* v. *Gifford*."[7] *Bower* v. *Hill*.

In *Kidgill* v. *Moor*,[8] on a motion in arrest of judgment, Cresswell, J., said: "*Jackson* v. *Pesked* decides that a declaration of this sort is insufficient, unless it contains an averment *Kidgill* v. *Moor*.

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[1] *Jackson* v. *Pesked* (1813), 1 Maule & Sel., Pt. I, 234; *Alston* v. *Scales* (1832), 9 Bing., 3; *Baxter* v. *Taylor* (1832), 4 B. & Ad., 72; *Bower* v. *Hill*, 1 Bing. N. C., 549 (555); 1 Scott., 526 (534); *Tucker* v. *Newman* (1839), 11 A. & E., 40; *Kidgill* v. *Moor* (1850), 9 C. B., 364; *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S., 590; *Metropolitan Association* v. *Petch* (1858), 5 C. B. N. S., 504; and *see Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287, 317, 318.

[2] *Tucker* v. *Newman*, *ubi sup.*

[3] *Kidgill* v. *Moor*, *ubi sup.*

[4] *Metropolitan Association* v. *Petch*, *ubi sup.*

[5] *Baxter* v. *Taylor*, *ubi sup.*

[6] (1835) 1 Bing. N. C., 549 (555); 1 Scott., 526 (534).

[7] (1767) 4 Burr., 2141.

[8] (1850) 9 C. B., 364 (379).

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"that the acts charged injured the plaintiff's reversionary "interest. That case, however, impliedly recognises the "validity of a declaration which contains such an averment, "and states facts which may or may not amount to such "injury of the reversion. Here the declaration alleges certain "things to have been done by the defendant so as to occasion "injury to the plaintiff's reversionary interest. I agree with "my brother *Maule* that that is an allegation of fact, and "that we must take it to have been proved if the facts stated "could so operate. It is impossible to state that a gate *may* "not be so fastened as to enure as an injury to the reversion."

In *The Metropolitan Association* v. *Petch*,[1] Williams, J., said: "The simple question, therefore, which we have to "decide, is, whether upon this declaration we can see that "it is impossible that the hoarding can be otherwise than a "temporary structure, and so not injurious to the reversion. "If at the trial it appears that the thing complained of is of "a mere transitory character, the jury will come to the con- "clusion that it is not such an injury as to entitle the "plaintiffs to maintain the action. But it may be that this "hoarding may have been kept up in denial of the right of "the plaintiffs to the windows in question; in which case, if "acquiesced in by the plaintiffs for any length of time, it "might furnish a serious body of evidence against them if "ever their right should come to be contested." Later, in his judgment, the same Judge said[2]: "Then there is the case of "*Kidgill* v. *Moor*, which appears to me completely to govern "the present case. There, a declaration in case by a rever- "sioner alleged that the plaintiff was entitled to a right of "way for his tenants over a certain close of the defendant, "and charged that the defendant wrongfully locked, chained, "shut, and fastened a certain gate standing in and across the "way, and wrongfully kept the same so locked, etc., and "thereby obstructed the way; and that by means of the "premises, the plaintiff was injured in his reversionary

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[1] (1858) 5 C. B. N. S., 504 (510). [2] *Ibid.* at p. 513.

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"estate; and it was held, on motion in arrest of judgment, "that the declaration was sufficient, inasmuch as such an "obstruction *might* occasion injury to the reversion, and it "must be assumed, after verdict, that evidence to that effect "had been given. There is no distinction now between the "construction of a declaration before and after verdict. The "obstruction here complained of *may* be an injury to the "plaintiff's reversionary interest, and therefore we cannot "consistently with the authorities hold the declaration to be "insufficient."

(2) *Who are liable to be sued.*

An easement being a right *in rem*, it follows that any one creating the disturbance is liable therefor, whether he be the owner or occupier of the servient tenement or not.

Enumeration of persons liable.

So long as the disturbance continues the person or persons at whose direction it was created, the person or persons actually creating it, and the person or persons who are responsible for its continuance are all equally liable.[1]

Thus, the principal ordering the creation of the disturbance, and the servants or agents actually concerned in its creation,[2] the landlord responsible for the creation of the disturbance and the tenant responsible for its continuance,[3] or similarly any grantor and grantee, or devisor and devisee,[4] are each and all liable to be sued for the disturbance.

Thompson v. *Gibson*.

In *Thompson* v. *Gibson*,[5] the defendants had erected a

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[1] *Some* v. *Barwish* (1610), Cro. Jac., 231; *Rosewell* v. *Pryor* (1702), 2 Salk., 460; 1 Ld. Raym., 713; *Stone* v. *Cartwright* (1795), 6 T. R., 411; *Wilson* v. *Peto* (1821), 6 Moore, 47; *Thompson* v. *Gibson* (1841), 7 M. & W., 456; *Broder* v. *Saillard* (1876), 2 Ch. D., 692; *Jenks* v. *Viscount Clifden* (1897), 1 Ch., 694. And see further *supra*, Chap. IV, Part I, A, p. 196.

[2] *Stone* v. *Cartwright*; *Wilson* v. *Peto*; *Thompson* v. *Gibson*, *ubi sup.*; *Born* v. *Turner* (1900), 2 Ch., 211. In an action for disturbance against an adjoining owner and his builder, the latter may on reasonable grounds sever from the former in his defence and, where he is entitled to a complete indemnity from his employer, he may further get his solicitor and client costs from him, *Born* v. *Turner*, *ubi sup.*

[3] *Rosewell* v. *Pryor*; *Broder* v. *Saillard*, *ubi sup.*

[4] *Some* v. *Barwish*; *Jenks* v. *Viscount Clifden*, *ubi sup.*

[5] (1841) 7 M. & W., 456.

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building which was, and continued to be, a nuisance to the plaintiff's market by excluding the public from a part of the space on which the market was held. The building had been erected under the superintendence and direction of the defendants, not on their land, but on land belonging to the Corporation of Kendal, of which they were members.

The defendants contended that they were not liable for the continuance of the nuisance, that they were distinct persons from the Corporation, and that though they were guilty of having erected the nuisance, they could not be regarded as having continued it, inasmuch as they were not in possession of, or interested in, the soil on which the building had been erected.

The Court discharged the *rule nisi* granted to enter a non-suit.

In delivering the judgment of the Court Baron Parke said[1]: "If they," meaning the defendants, "are considered "merely as servants of the Corporation, they would be liable, "just as the servant or the individual is, if he is actually "concerned in erecting a nuisance; *Wilson* v. *Peto*: and as "they would clearly have been responsible to the then owner "of the market for the immediate consequences of their "wrongful act, how can their liability be confined to the "injury by the interruption of the first market, or what other "limit can be assigned to their responsibility other than the "continuance of the injury itself? Is he, who originally "erects a wall by which ancient lights are obstructed, to pay "damage for the loss of the light for the first day only? or "does he not continue liable so long as the consequences of "his own wrongful act continue, and bound to pay damages "for the whole time? . . ."

"In the case of *Rosewell* v. *Pryor*, which was an action "against the defendant, who erected an obstruction to the "ancient lights of the plaintiffs, and then aliened, Lord *Holt* "lays it down, 'that it is a fundamental principle in law and

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[1] *Ibid.* at p. 460.

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"'reason, that he that does the first wrong shall answer for "'all consequential damages, and here,' he says, 'the original "'creation does influence the continuance, and it remains a "'continuance from the very erection, and by the erection, "'till it be abated,' and he adds, 'that it shall not be in his "'power to discharge himself by granting it over.' . . ."

"It was also said that the defendants could not now "remove the nuisance themselves, without being guilty of a "trespass to the Corporation, and that it would be hard to "make them liable. But that is a consequence of their own "original wrong; and they cannot be permitted to excuse "themselves from paying damages for the injury it causes, "by shewing their inability to remove it, without exposing "themselves to another action."

Untenable pleas.

This case shews that in an action for a disturbance for which the defendant is responsible it is no answer on his part to say that he is not in possession of, or interested in, the servient tenement, and that he cannot remove the disturbance himself without being guilty of a trespass.

Joinder of parties.

The person or persons at whose direction the disturbance is created and the person or persons actually concerned in creating it may be joined as co-defendants, or an action can be brought at option against either of them.[1]

The same rule applies to the author of the disturbance and the person continuing it.[2]

Request to remove disturbance, when to be made.

Where the party sued is not the original creator of the disturbance a request should be made to him to remove the disturbance before the action is brought.[3]

If such request is made to the party in possession it will be sufficient to found the action even though such party be the lessee only of the original creator of the disturbance.[4]

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[1] *Stone* v. *Cartwright* (1795), 6 T. R., 411; *Wilson* v. *Peto* (1821), 6 Moore, 47; *Thompson* v. *Gibson* (1841), 7 M. & W., 456.

[2] *Some* v. *Barwish* (1610), Cro. Jac., 231; *Rosewell* v. *Pryor* (1702), 2 Salk., 460; 1 Ld. Raym., 713; *Broder* v. *Saillard* (1876), 2 Ch. D., 692.

[3] *Penruddock's case* (1598), 5 Rep., 101; Gale on Easements, 8th Ed., p. 588.

[4] *Brent* v. *Haddon* (1620), Cro. Jac., 555; Gale, *ubi sup.*

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Landlord when not liable.

A landlord is not liable if the disturbance occurs for the first time during the tenancy unless it was created with his authority.[1]

Essentials of liability.

In every case the defendant must be shewn to be responsible for the creation of the disturbance or its continuance and to have the power to abate it.

Thus, it appears that a tenant for years who occupies a house erected by his landlord which obstructs another's light and air, is not liable for the continuance of the nuisance provided he does no other act to prejudice the dominant owner or occupier besides inhabiting the house, since he has no authority to abate the nuisance.[2]

Similarly, if the servient tenement is held under a repairing lease, and the disturbance is caused by the tenant's failure to repair, the landlord is not liable.[3]

Remedy against wrong-doer before prescriptive right acquired.

Although before a prescriptive right is required there is no cause of action against the owner of the servient tenement or his licensee for disturbance of the incomplete right, except on the ground of negligence,[4] it appears that there is a remedy against a trespasser or wrong-doer who is guilty of such disturbance.

Thus the *de facto* support of a house by the soil of a neighbour is sufficient title against any one but that neighbour, or one claiming through him.[5]

"Just as one who should prop his house up by a shore "resting on his neighbour's ground, would have a right of "action against a stranger, who, by removing it, causes the "house to fall; but none against his neighbour, or one "authorised by the neighbour to do so, if he took it away "and caused the same damage."[6]

Similarly the obstruction of light and air before the

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[1] Gale, *ubi sup.* at p. 589.

[2] *Ryppon* v. *Bowles* (1615), Cro. Jac., 373.

[3] *Gwinnell* v. *Eamer* (1875), L. R., 10 C. P., 658.

[4] As in the case of support, *see supra*, p. 170.

[5] *Jeffries* v. *Williams* (1850), 5 Exch., 782; *Bibby* v. *Carter* (1859), 4 H. & N., 153; 28 L. J. Exch., 182.

[6] *Jeffries* v. *Williams*, *per* Parke, B., *ubi sup.* at p. 800.

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acquisition of the prescriptive right may be actionable if caused by a trespasser.[1]

The question of the responsibility of a servient owner or occupier for the negligence or wrongful act of the contractor employed by him has already been considered in connection with the doctrine of negligence.[2]

(3) *The Pleadings.*

General rules.

As an easement is not one of the ordinary rights of ownership, it is necessary that either party claiming or relying on an easement should plead the nature of his title thereto so as clearly to shew the origin of the right, whether statutory prescription, or express or implied grant, or the old common law method of a lost grant.[3]

When an easement is claimed or pleaded by prescription, and there is any danger of the prescriptive title failing to meet the requirements of the fourth paragraph of section 26 of the Indian Limitation Act,[4] or of the corresponding paragraph of section 15 of the Indian Easements Act,[5] it is expedient to rely also on the common law method of acquisition, so that if the claim or plea fail in the one respect it may be saved in the other, for it will be remembered that in India, as in England, the common law method of acquisition is as available as the statutory.[6]

In every case the statement of the title should be exact.[7] The nature of the disturbance should be clearly stated, and the obstruction should be of that in which the right is

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[1] *Dhuman Khan* v. *Muhammad Khan* (1896), I. L. R., 19 All., 153.

[2] *See supra*, p. 179.

[3] *Harris* v. *Jenkins* (1882), 22 Ch. D., 481; 52 L. J. Ch., 437; *Spedding* v. *Fitzpatrick* (1888), 38 Ch. D., 410; 58 L. J. Ch., 139; Bullen and Leake, Prec. of Pleading, 6th Ed., pp. 11, 339, 422, 943, 944, 947; and *see* Notes to *Pomfret* v. *Ricroft*, 1 Wms. Saund. at p. 571.

[4] *See* App. IV.

[5] *See* App. VII.

[6] *See supra*, pp. 45, 46, 457, 458, 463, 464, and Bullen and Leake, Prec. of Pleading, 6th Ed., pp. 421, 943, 944, 947, *et seq.*

[7] *Fentiman* v. *Smith* (1803), 4 East., 107; *Whaley* v. *Laing* (1857), 2 H. & N., 476; in error 27 L. J. Exch., 422; *Tebbutt* v. *Selby* (1837), 6 Ad. & E., 786.

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asserted. Thus, where a plaintiff alleged a right to the use of a cistern and that the defendant had fastened up a door and doorway leading to the cistern and thereby prevented the plaintiff from having access to the cistern, it was held that the declaration was bad for not shewing a right to use the door.[1]

The proof of an easement larger than the easement alleged but not different in kind, is not such a variance as is fatal to the case set up.[2]

The right claimed must not be larger than the right proved, but if the right claimed is divisible, such portion thereof as is proved may be decreed. Thus, if a man claim a right of ferry from one place to another, and then again to another place, and prove the right only for the latter distance, he may have a decree to that extent.[3]

But if a party claims the right to do a particular thing by virtue of a right of ownership of land itself, he cannot turn round afterwards and claim the right to do the same thing by virtue of an easement.[4] For a claim to ownership of land is quite inconsistent with a claim of easement over it.[5]

So, too, there cannot be, in respect of the same land, a simultaneous claim to the ownership of the land and to an easement over it.[6]

But there would be no objection to a claim in the alternative and to the establishment of either right provided the other were abandoned.[7]

In claiming or pleading a title under the Indian Limitation Act or the Indian Easements Act, there should be a

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[1] *Tebbutt* v. *Selby*, *ubi sup.*

[2] *Duncan* v. *Louch* (1845), 6 Q. B., 904.

[3] *Giles* v. *Groves* (1848), 12 Q. B., 721.

[4] *Chunilal Fulchand* v. *Mangaldas Govardhandas* (1891), I. L. R., 16 Bom., 592.

[5] *Sham Churn Auddy* v. *Tariney Churn Banerjee* (1876), 25 W. R., 228; I. L. R., 1 Cal., 422.

[6] *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (1907), I. L. R., 34 Cal., 51.

[7] *Ibid.*, overruling *Bijoy Keshub Roy* v. *Obhoy Churn Ghose* (1871), 16 W. R., 198.

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specific allegation of the acquisition of the easement in accordance with the requirements of either enactment.[1]

The defendant in an action for the obstruction of an easement must, where the allegation of such right is disputed, expressly deny, or state that he does not admit, the allegation.[2]

So, too, the possession of the plaintiff where he claims in right of possession, or of his property in the reversion if he sues as reversioner, should be expressly denied.[3]

Easements of light and air.

In claiming an easement of light and air by prescription, the allegation that the windows in respect of which the right is claimed are "ancient lights" may be sufficient, but in order to avoid any risk of the pleading being adjudged as embarrassing to the other party it is desirable specifically to allege the mode in which the claim arises.[4]

If the right is claimed under section 26 of the Indian Limitation Act or under section 15 of the Indian Easements Act, there should be an express allegation of the acquisition of the right in accordance with the requirements of those sections.

In defending an action for the obstruction of light and air the defendant should specifically deny every allegation of fact constituting the right which he wishes to deny, and there should be a specific statement by him of the facts upon which he relies as controverting the plaintiff's claim and justifying the act on his part of which the plaintiff complains.[5]

Private rights of way.

As regards a private right of way, the plaintiff claiming such easement, or suing for its obstruction, or the defendant pleading such easement, should state the right and the method of its acquisition, and should shew with reasonable precision and exactitude the *termini* of the way and the course which it takes.[6]

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[1] For the method of acquisition under these Acts, *see* Indian Limitation Act, XV of 1877, s. 26, App. IV; I. E. Act, s. 15, App. VII.

[2] Bullen and Leake, Prec. of Pleading, 6th Ed., pp. 870, 918, 943, 946.

[3] *Ibid.*

[4] Bullen and Leake, *ubi sup.* at p. 422; and *see Harris* v. *Jenkins*; *Spedding* v. *Fitzpatrick*, *ubi sup.*

[5] *See* Bullen and Leake, *ubi sup.* at p. 870.

[6] *Rouse* v. *Bardin* (1790), 1 H. Bl., 351; *Harris* v. *Jenkins*; *Spedding* v. *Fitzpatrick*, *ubi sup.*

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Ways of necessity.

When the way is one of necessity, the plaintiff who claims it, or the defendant who pleads it in justification, must allege that there is no way to or from the dominant tenement other than by the particular way claimed or pleaded.[1]

Since there is no such thing in law as a general way of necessity, it is erroneous to plead a way of necessity in general terms without specifying the manner whereby the land over which the way is claimed became subject to the burthen. For, inasmuch as a way of necessity is derived from grant, passing as incident to the grant of the dominant tenement by operation of law, it is as necessary to set forth the title to a way of necessity as it is to a way by express grant.[2]

If the origin of a way of necessity has been lost sight of, but the easement has been used without interruption, it can be claimed as a way either by grant or prescription according to the circumstances of the particular case.[3]

If there has at one time been unity of possession, the easement must then be claimed as a way by grant, and it should be stated that the same person was the absolute owner of both tenements, and being such, granted one of them. But where there has been no unity of possession, the easement should be claimed by prescription.[4]

Public and private way cannot be claimed or pleaded together.

A public way and a private prescriptive way cannot be claimed or pleaded together as the two are inconsistent.[5]

Rule where private way becomes partly public.

Where a private way becomes public in part of its course, it is not necessary in pleading the private way to state that part of it has become public.[6]

Public rights of way.

In claiming or pleading a public way or highway it is not necessary to set out the *termini* because the public have a right to use the way, for all purposes, and at all times.[7]

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[1] Bullen and Leake, Prec. of Pleading, 6th Ed., p. 951; Notes to *Pomfret* v. *Ricroft*, 1 Wms. Saund. at p. 570; *Proctor* v. *Hodgson* (1855), 10 Exch., 824.

[2] Notes to *Pomfret* v. *Ricroft*, 1 Wms. Saund. at pp. 571 *et seq.*

[3] *Ibid.* at p. 572.

[4] *Ibid.* at pp. 572, 573.

[5] *Chichester* v. *Lethridge* (1738), Willes, 71.

[6] *Duncan* v. *Louch* (1845), 6 Q. B., 904, 916.

[7] *Rouse* v. *Bardin* (1790), 1 H. Bl., 351.

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The mode in which or the title under which the particular way has become a public way must be shewn, and if the plaintiff or defendant, as the case may be, relies on any specific acts of dedication, or specific declarations of intention to dedicate whether alone, or jointly with evidence of user, he should set forth the nature and dates of such acts or declarations, and the names of the persons by whom the same were done or made.[1]

Easements relating to water.

In the case of easements relating to water, as well as in the case of other easements, the mode in which the right arises, whether by grant, prescription, or under the Indian Limitation Act or Indian Easements Act, should be stated in the plaint.[2]

Easements of support.

Inasmuch as the right to support for buildings is an easement and not a natural right, the plaintiff, except where the defendant appears to be a mere tort feasor, must allege or shew a title to such support; but a general averment of title will not be sufficient; he must shew whether he claims by grant, or by long enjoyment, or by statute or otherwise.[3]

Where a plaintiff's claim relates to an easement of support, and discloses some right on the part of the defendant by virtue of ownership of the adjoining or subjacent land to do the act complained of, it will be a sufficient defence if the defendant denies the plaintiff's allegations of title to the easement, and all allegations of fact supporting such title.[4]

But where the plaint discloses no such right on the part of the defendant, and deals with him *primâ facie* as a trespasser or wrong-doer, there must be not only the denials aforesaid, but also a statement by the defendant shewing a *primâ facie* right on his part to do the act complained of.[5]

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[1] *Spedding* v. *Fitzpatrick* (1888), 38 Ch. D., 410; 58 L. J. Ch., 139.

[2] Bullen and Leake, Prec. of Pleading, 6th Ed. at pp. 511, 512.

[3] *Jeffries* v. *Williams* (1850), 5 Exch., 792; *Bibby* v. *Carter* (1859), 4 H. & N., 150; 28 L. J. Exch., 182; Bullen and Leake, *ubi sup.* at p. 486.

[4] Bullen and Leake, *ubi sup.* at p. 918.

[5] *Jeffries* v. *Williams*; *Bibby* v. *Carter*, *ubi sup.*; Bullen and Leake, *ubi sup.* at p. 486.

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Suits by reversioners.

If a reversioner sues, he must sue in that capacity, and must either allege something which is necessarily an injury to his reversion, or where the act complained of may or may not be injurious, he must allege that such fact is an injury to his reversionary interest.[1]

(4) *The Nature of the Remedy.*

Influence of English principles.

That part of the law of India which relates to the nature of the relief to be afforded by the Court for the actionable disturbance of an easement rests primarily on English principles as determined at law or in equity acting in aid of law.

Indian Courts and Legislature have in turn resorted to English decisions for guidance, and if there is now, in any respect, an absence of uniformity between the law of India and the law of England it is only where codification in India has settled a vexed or doubtful question.

A notable illustration of this English influence is to be found in the introduction long since into India of the principles of equitable relief by injunction, now embodied in general terms in sections 54 and 55 of the Specific Relief Act,[2] and this, not because they were part of the English law, but because they were in accordance with equity and good conscience,[3] upon which foundation the whole fabric of the general law in India mainly rests.[4]

It is thought, therefore, that the present inquiry would not be complete without some reference to the course of English legislation, to the jurisdiction assumed by the English Courts in actions for the disturbance of easements, and to the principles established by the leading English authorities.

It is proposed to divide the subject under the following heads :—

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[1] *Jackson* v. *Pesked* (1813), 1 Maule & Sel., Pt. I, 234 ; *Baxter* v. *Taylor* (1832), 4 B. & Ad., 72 ; *Kidgill* v. *Moor* (1850), 9 C. B., 364 ; *Jeffries* v. *Williams*, *ubi sup.* at pp. 799, 800 ; *Metropolitan Association* v. *Petch* (1858), 5 C. B. N. S., 504.

[2] *See* App. V.

[3] *Shamnugger Jute Factory Co.* v. *Ram Narain Chatterjee* (1887), I. L. R., 14 Cal., 189 (199) ; and *see Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35 (67).

[4] *See supra*, pp. 40, 41, 42.

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(*a*) Jurisdiction of the English Courts and course of English legislation.
(*b*) Relief by temporary or interlocutory injunction.
(*c*) Relief at the hearing by—
(1) Damages only.
(2) Preventive or perpetual injunction only.
(3) Damages in addition to preventive or perpetual injunction.
(4) Mandatory injunction only.
(5) Damages in addition to mandatory injunction.
(6) Preventive or perpetual injunction in addition to mandatory injunction.
(7) Damages in addition to perpetual and mandatory injunction.

(*a*) *Jurisdiction of English Courts and course of English legislation.*

Prior to Judicature Act, 1873.

Before the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 25 (8), the jurisdiction to grant injunctions to restrain the actionable disturbance of easements was, with certain exceptions,[1] exclusively exercised by the Court of Chancery.[2]

But, formerly, this jurisdiction was not an original jurisdiction, because an easement was a purely legal right, and, as such, cognisable only by a Court of common law, and the province of a Court of Equity was simply to grant an injunction in aid of the legal right whenever there was danger of irreparable mischief, or where an injunction was required to prevent a multiplicity of actions for the recovery of damages.[3]

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[1] By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 79–82, injunctions in restraint of wrongful acts could be claimed in, and granted by, a common law Court. These sections were repealed by the Statute Law Revision and Civ. Proc. Act, 1883 (46 & 47 Vict. c. 49).

[2] *See* Kerr on Injunctions, 4th Ed., p. 3.

[3] *Cowper* v. *Laidler* (1903), 2 Ch., 337; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (188).

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Thus, if, on an application for an injunction, either the existence of the legal right or the fact of its violation was disputed, the applicant was first required to establish the right at law.[1]

Chancery Procedure Act, 1852.

Subsequently, by the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 62, the Court of Chancery was empowered to determine the legal right itself.[2]

Lord Cairns' Act, 1858.

Under Lord Cairns' Act, 1858 (21 & 22 Vict. c. 27), the Court of Chancery was empowered, in all cases in which it had jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages either in addition to, or in substitution for, such injunction.[3]

Sir John Rolt's Act, 1862.

By Act 25 & 26 Vict. c. 42, commonly known as Sir John Rolt's Act, it was provided that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery was sought, whether the title to such relief or remedy was or was not incident to or dependent upon a legal right, every question of law or fact cognisable in a Court of Common Law on the determination of which the title to such relief or remedy depended should be determined by or before the same Court.[4]

Judicature Act, 1873.

These two Acts were superseded by the Judicature Act, 1873,[5] and now the High Court of Justice in England has all the jurisdiction of the Court of Chancery and of the several Courts of law.[6]

Statute Law Revision and Civil Procedure Act, 1883.

Lord Cairns' Act was repealed by the Statute Law Revision and Civil Procedure Act, 1883, but by section 5 (*b*) thereof the jurisdiction of the Court under Lord Cairns' Act was preserved notwithstanding the repeal.[7]

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[1] *See Imperial Gas Light and Coke Co.* v. *Broadbent* (1859), 7 H. L. C., 600 (612); Gale on Easements, 8th Ed., p. 599.

[2] This Act was repealed by Act 46 & 47 Vict. c. 49.

[3] *Colls* v. *Home and Colonial Stores, Ltd.*, *ubi sup.*

[4] *Ibid.*

[5] *Ubi sup.*

[6] *Colls* v. *Home and Colonial Stores, Ltd.*, *ubi sup.*

[7] *Sayers* v. *Collyer* (1884), 28 Ch. D., 103 (107); *Cowper* v. *Laidler*, *ubi sup.* at p. 339.

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Scope and effect of Lord Cairns' Act.

The scope and effect of Lord Cairns' Act have been frequently the subject of judicial comment and decision, and the result of the authorities appears to be shortly as follows :—

(1) Where a mandatory injunction is asked, the Act gives jurisdiction to substitute damages for injunction.[1]

(2) Where the Court is asked to restrain the continuance of a nuisance already committed and intended to be continued, the Act gives jurisdiction to award damages in lieu of granting an injunction.[2]

(3) But where a nuisance has not yet been committed, but is only threatened and intended, a clear opinion has been expressed that there is no jurisdiction to substitute damages for an injunction.[3]

(*b*) *Relief by Temporary Injunction.*

Defined by Spec. Relief Act, s. 53, regulated by Civ. Pro. Code

Temporary or interlocutory injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.[4]

Such injunctions may be granted to restrain a threatened or continuing injury (whether compensation is claimed in the suit or not), at any time after the commencement of the suit, and either before or after judgment,[5] and either during term or vacation, and whether the Court is sitting or not.[6]

But it is not the practice of the Court of Chancery in England to grant an injunction in chambers when the Court is sitting.[7]

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[1] *Cowper* v. *Laidler*, *ubi sup.*; and *see* further, *infra*, under (*c*) "Relief at the hearing."

[2] *Ibid.*

[3] *Dreyfus* v. *Peruvian Guano Co.* (1890), 43 Ch. D., 316, 333, 342; *Martin* v. *Price* (1894), 1 Ch., 276; *Cowper* v. *Laidler*, *ubi sup.*; and *see* further, *infra*, under (*c*) "Relief at the hearing." But *see contra Holland* v. *Worley* (1884), 26 Ch. D., 578, which appears to be the only case in which damages were granted in lieu of a prohibitory injunction. *See Cowper* v. *Laidler*, *ubi sup.* at p. 340.

[4] *See* the definition in Spec. Rel. Act, s. 53, first para., App. V. *See* Order XXXIX, rules 1–5, of Code of Civil Procedure, Act V of 1908, repealing the Code of 1882, *see* App. X.

[5] Civ. Pro. Code, Act V of 1908, Order XXXIX, rule 2 (1), *see* App. X.

[6] Kerr on Injunctions, 4th Ed. at p. 554.

[7] *Ibid.*

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Principles applicable to.

Subject to such considérations as are specially applicable to the granting of temporary injunctions, this form of relief is governed by the same general principles as regulate the granting of perpetual injunctions.[1] Such general principles will be considered later in connection with the subject of relief by perpetual injunction[2]; for the present, it will be sufficient to draw attention to the rules which are specially applicable to the granting of temporary injunctions.

Special rules relating to.

In relation to temporary or interlocutory injunctions the function of the Court is not to ascertain the existence of a legal right, but solely to protect property by such restraint as may be required to stop the mischief, and to keep matters *in statu quo*, until the right can be properly determined at the trial.[3]

But in order to obtain the protection of the Court a clear *primâ facie* case must be made out,[4] and where the plaintiff's legal title is disputed or its invasion denied, an injunction will not usually be granted without requiring proof of the legal right.[5]

Where the question as to the legal right is one on which the Court is not prepared to express an opinion, or where the legal right being admitted the fact of its invasion is denied, the practice of the Court is either to grant an injunction until the hearing, or to order the motion to stand over until the question of the legal right has been determined.[6]

In deciding which of these two courses it shall adopt, the Court will take into consideration the comparative inconvenience or injury to the one side or the other which may arise from either granting or refusing the injunction.[7]

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[1] *Nusserwanji* v. *Gordon* (1881), I. L. R., 6 Bom., 266 (279).

[2] *See infra* under (*c*) I, B.

[3] *Saunders* v. *Smith* (1838), 3 Myl. & Cr., 711 (728); *Harman* v. *Jones* (1841), Cr. & Ph., 299; *Hilton* v. *Earl of Granville* (1841), Cr. & Ph., 283 (292); Kerr on Injunctions, 4th Ed., p. 20; 2 Daniell's Chan. Prac., 7th Ed., p. 1360.

[4] *Hilton* v. *Earl of Granville*, *ubi sup.*; *Shrewsbury and Chester Ry. Co.* v. *Shrewsbury and Birmingham Ry. Co.* (1851), 1 Sim. N. S. 410, (426); *Sparrow* v. *Oxford, Worcester and Wolverhampton Ry. Co.* (1851), 9 Hare, 436.

[5] Kerr, *ubi sup.* at p. 29.

[6] *Ibid.*

[7] *Plimpton* v. *Spiller* (1876), 4 Ch. D., 286, 289, 292; *Elwes* v. *Payne* (1879), 12 Ch. D., 478; *Newson* v. *Pender* (1884),

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The burthen lies upon the party applying for the injunction of shewing that the greater inconvenience or injury is on his side.[1]

When will, and will not, be granted.

As a rule, the Court will not interfere by interlocutory injunction unless it is satisfied that irreparable, or at least serious, damage has been or will be caused to the plaintiff before the question of the legal right can be determined.[2]

"Irreparable" does not mean without physical possibility of repair, but material and incapable of adequate relief in damages.[3]

When, therefore, adequate relief can be obtained in damages and the injury is neither serious nor material, the injunction will not be granted.[4]

Again, if the legal right is not disputed, it must be shewn that there is an actual or threatened invasion of the right[5]; the mere prospect or apprehension of injury is not sufficient, but if the defendant insists on his right to do, or threatens to do, or gives notice of his intention to do, something which, if done, would be an actionable wrong, the Court will have jurisdiction to interfere by injunction.[6]

Mala fides. Acquiescence. Delay.

Failure to come into Court with clean hands, or acquiescence in the injury complained of, will disentitle a plaintiff to relief.[7] Though delay may not amount to absolute proof of acquiescence, it is always an element to be considered by the Court in

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27 Ch. D., 43; Kerr, *ubi sup.* at pp. 20, 21; 2 Daniell, *ubi sup.*; and *see Madras Ry. Co.* v. *Rust* (1890), I. L. R., 14 Mad., 18.

[1] *Child* v. *Douglas* (1854), 5 De G. M. & G., 739; Kerr, *ubi sup.* at p. 21.

[2] Kerr, *ubi sup.* at pp. 12, 14; *Mogul Steamship Co.* v. *McGregor Gow & Co.* (1885), 15 Q. B. D., 476.

[3] *Ibid.* The term "adequate relief" has been defined as "such a compensation "as will in effect, though not in specie, "place the plaintiff in the same position "in which he previously stood," *per* Kindersley, V.C., in *Wood* v. *Sutcliffe* (1851), 2 Sim. N. S., 163 (165); 21 L. J. Ch., 253 (255). *See* this definition discussed in *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom. at p. 488, and in *Boyson* v. *Deane* (1898), I. L. R., 22 Mad. at p. 254; and *see* further, *infra*, (*c*), I, B (3) and II, A.

[4] Kerr, *ubi sup.* at p. 14; 2 Daniell, *ubi sup.*

[5] Kerr, *ubi sup.* at p. 13.

[6] *Ibid.*, and *see* the authorities cited in note 3 to p. 190.

[7] Kerr, *ubi sup.* at pp. 15–19. *See* further as to "acquiescence," *infra*, (*c*), I, D.

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determining the question whether relief, interlocutory or perpetual, should be granted.[1]

Mere abstention from legal proceedings is not of itself sufficient to disentitle the complaining party to relief, provided the other party has not altered his position during the delay.[2]

But a party seeking relief on interlocutory application should come in at the earliest possible moment[3]; for a much less strong case of acquiescence need be made out on an interlocutory application than at the hearing,[4] because "at the "hearing of a cause it is the duty of the Court to decide upon "the rights of parties, and the dismissal of the bill, upon the "ground of acquiescence, amounts to a decision that a right "which has once existed is absolutely and for ever lost."[5]

Injunction may be granted or withheld upon terms.

It is in the discretion of the Court to grant a temporary injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court may think fit.[6]

Penalty for breach.

In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.[7]

Practice in India.

Following the practice in England it is usual in India for the Court to insert in its order granting a temporary

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[1] *Atty.-Genl.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G., 304 (324); *Ware* v. *Regents Canal Co.* (1858), 3 De G. & J., 212 (230); *Gaunt* v. *Fynney* (1872), L. R., 8 Ch. App., 8 (14).

[2] *Rochdale Canal Co.* v. *King* (1851), 2 Sim. N. S., 78; *Archbold* v. *Scully* (1861), 9 H. L. C., 360 (388); *Gale* v. *Abbott* (1862), 8 Jur. N. S., 987. *See* further as to "Delay," *infra*, (c), I, D.

[3] *Gale* v. *Abbott*, *ubi sup.*

[4] *Johnson* v. *Wyatt* (1864), 2 De G. J. & S., 18 (25); 9 Jur. N. S., 1333 (1334), and *see Child* v. *Douglas* (1854), 5 De G. M. & G., 739 (741).

[5] *Johnson* v. *Wyatt*, *ubi sup.*, *per* Turner, L.J.

[6] Civ. Pro. Code, Act V of 1908, Order XXXIX, rule 2 (2), *see* App. X.

[7] Civ. Pro. Code, Act V of 1908, Order XXXIX, rule 2 (3), *see* App. X. But no attachment under this rule is to remain in force for more than one year, at the end of which time if the disobedience or breach continues, the property attached may be sold and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto, *ibid.*, rule 2 (4).

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injunction, an undertaking on behalf of the plaintiff to abide by any order that may thereafter be made as to damages in the event of its being found that the injunction was wrongly granted.[1]

When, after such an undertaking has been given, it is established at the trial that the plaintiff was not entitled to an injunction, an inquiry as to damages may be directed though the plaintiff was not guilty of suppression of material facts or other improper conduct in obtaining the injunction.[2]

On the other hand, the Court may withhold the injunction and protect the plaintiff from damage during the interval before the hearing by imposing certain terms upon the defendant with his consent.[3]

In such cases the order usually is that the motion for an interlocutory injunction do stand over until the hearing of the action upon the defendant undertaking to abide by any order which may then be made directing the pulling down of any additional buildings erected in the interval[4]; though at the trial it may be a matter for consideration as to whether a mandatory injunction ought to be granted where an altogether disproportionate injury would be thereby inflicted on the defendant.[5]

But where the defendant has continued to build after action brought or notice otherwise received of the plaintiff's rights the Court even in the absence of such undertaking would have jurisdiction at the trial to order the pulling down

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[1] *See* Belchambers' Practice of the Civil Courts, p. 178; and *see Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839. For the English practice, *see* Kerr, *ubi sup.* at p. 567; Gale on Easements, 8th Ed., pp. 606, 607.

[2] *Griffith* v. *Blake* (1884), 27 Ch. D., 474.

[3] Belchambers, *ubi sup.*

[4] *See Wilson* v. *Townend* (1860), 1 Dr. & Sm., 324; *Mackey* v. *Scottish Widows Fund Assurance Society* (1876), Ir. Rep., 10 Eq., 114; 24 W. R. Dig., 96; *Smith* v. *Day* (1880), 13 Ch. D., 651; *Greenwood* v. *Hornsey* (1886), 33 Ch. D., 471; 55 L. T., 135; *Smith* v. *Baxter* (1900), 2 Ch., 138.

[5] *See Aynsley* v. *Glover* (1874), L. R. 18 Eq., 544 (553); *Dhunjibhoy* v. *Lisbon* (1888), I. L. R., 13 Bom., 252, 260, 261; *Anath Nath Deb* v. *Galstaun* (1908), I. L. R., 35 Cal., 661.

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of the additional building so erected and would unhesitatingly exercise it.[1]

Usually granted on notice.

The Court must in all cases except where it appears that the object of granting the injunction would be defeated by the delay, before granting a temporary injunction, direct notice of the application for the same to be given to the opposite party.[2]

Practice in India.

The practice of the Court is ordinarily to grant a rule *nisi* for an injunction, together with, if the emergency of the case so requires, an *interim* order operating as an injunction until the day mentioned in the rule,[3] or until the disposal of the rule.[4]

Discharge, variation, or setting aside of injunction.

Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.[5]

When directed to Corporation, on whom binding.

An injunction directed to a Corporation is binding not only on the Corporation itself, but also on all members and officers of the Corporation whose personal action it seeks to restrain.[6]

Compensation to defendant for issue of injunction on insufficient grounds.

Under section 497 of the Civil Procedure Code of 1882[7] the Court had discretion to award compensation, within certain limits, to the defendant for the issue of an injunction on insufficient grounds, and such award when made was a bar to any suit for compensation in respect of the issue of the injunction.

Mandatory injunction when granted on interlocutory application.

Though a mandatory injunction is not usually granted until the hearing,[8] there is no rule that it cannot be granted upon an interlocutory application if the circumstances of the case so require.[9]

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[1] *Kelk* v. *Pearson* (1871), L. R., 6 Ch. App., 809; *Smith* v. *Smith* (1875), L. R., 20 Eq. 500; *Mackey* v. *Scottish Widows Fund Assurance Society*, *ubi sup.*; *Krehl* v. *Burrell* (1878), 7 Ch. D., 551; 11 Ch. D., 146; *Gaskin* v. *Balls* (1879), 13 Ch. D., 324; *Smith* v. *Day*, *ubi sup.*; *Greenwood* v. *Hornsey*, *ubi sup.*; and *see* *Daniel* v. *Ferguson* (1891), 2 Ch., 27; *Von Joel* v. *Hornsey* (1895), 2 Ch., 774.

[2] Civ. Pro. Code, Act V of 1908, Order XXXIX, rule 3, *see* App. X.

[3] Belchambers' Practice of the Civil Courts, p. 177.

[4] *Ibid.* This is the form ordinarily used in the Calcutta High Court, *Ibid.*

[5] Civ. Pro. Code, Act V of 1908, Order XXXIX, rule 4, *see* App. X.

[6] Civ. Pro. Code, Act V of 1908, Order XXXIX, rule 5, *see* App. X.

[7] Act XIV of 1882 repealed by Civ. Pro. Code, Act V of 1908, in which no corresponding provision appears, *see* App. X.

[8] *Gale* v. *Abbott* (1862), 8 Jur. N. S. at p. 988.

[9] *Beadel* v. *Perry* (1866), L. R., 3 Eq. 465 (468).

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Thus, where the erection complained of is merely temporary,[1] or where, pending litigation, the defendant continues to build,[2] or where he attempts to forestall, or impose upon, the Court,[3] a mandatory injunction will usually be granted.

Daniel v. *Ferguson*.

In *Daniel* v. *Ferguson*,[4] which was an action to restrain the defendant from so building as to darken the plaintiff's lights, the defendant upon being served with notice of motion for an injunction set a gang of men to work and ran up his wall to a height of thirty-nine feet before receiving notice that an injunction had been granted. It appeared to be a nice question whether the plaintiff had acquired an easement of light, but he had made out a case enabling him to have matters kept *in statu quo* by injunction until the trial.

It was held that the building so run up should be pulled down at once, without regard to what the result of the trial might be, on the ground that the erection of it was an attempt to anticipate the order of the Court.

Von Joel v. *Hornsey*.

And in *Von Joel* v. *Hornsey*,[5] where the defendant, having been warned that if he continued building near the plaintiff's house he would be sued for an injunction to restrain such building as an obstruction of the plaintiff's ancient lights, evaded service of the writ after action brought and continued the same building until substituted service, it was held that such conduct brought him within the principle of *Daniel* v. *Ferguson*,[6] and that the plaintiff was accordingly entitled to a mandatory injunction ordering the defendant to pull down so much of his building as had been erected after he had received the plaintiff's warning.

(c) *Relief by injunction or damages at the hearing.*

I. Generally.

Forms of relief at the hearing.

At the hearing of a suit for the disturbance of an easement the relief granted may, according to the circumstances of the

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[1] *Staight* v. *Burn* (1869), L. R., 5 Ch. App., 163 (166).

[2] *Beadel* v. *Perry*, *ubi sup.*

[3] *Daniel* v. *Ferguson* (1891), 2 Ch., 27; *Von Joel* v. *Hornsey* (1895), 2 Ch., 774.

[4] *Ubi sup.*

[5] *Ubi sup.*

[6] *Ubi sup.*

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case and the jurisdiction of the Court, take one or other of the following forms :—

(1) Damages only.
(2) Preventive or perpetual injunction only.
(3) Damages in addition to preventive or perpetual injunction.
(4) Mandatory injunction only.
(5) Damages in addition to mandatory injunction.
(6) Preventive or perpetual injunction in addition to mandatory injunction.
(7) Damages in addition to perpetual and mandatory injunction.

Jurisdiction of Court of Chancery at time of passing of Specific Relief Act, I of 1877.

Before dealing with the Indian law on this subject it will be desirable to advert to the principles upon which the Court of Chancery, at the time of the passing of the Specific Relief Act, I of 1877, in India, was exercising its jurisdiction to grant an injunction or to substitute damages therefor, since, as already observed, the principles of equitable relief by injunction are the foundation of the Indian statutory and case law.[1]

It will be remembered that before Lord Cairns' Act, 21 & 22 Vict. c. 27, the relief granted by the Court of Chancery, for the disturbance of easements, could only be by injunction in aid of the legal right.[2]

In determining the question whether the plaintiff was entitled to relief by injunction, a Court of Chancery had always the following considerations before it: the materiality and permanency of the injury, the diminution of enjoyment of the easement, the invasion of the legal right from which, as has been seen, substantial damage could be presumed, and the adequacy of damages as a means of compensation.[3]

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[1] *See Shamnugger Jute Factory Co. v. Ram Narain Chatterjee* (1887), I. L. R., 14 Cal., 189 (199); *Land Mortgage Bank of India v. Ahmedbhoy* (1883), I. L. R., 8 Bom., 35 (67); and *supra*, p. 612, under "Influence of English principles."

[2] *See supra*, 4 (a), p. 613.

[3] *Atty.-Genl. v. Nichol* (1809), 16 Ves. 338 (342); *Jackson v. Duke of Newcastle* (1864), 3 De G. J. & S., 275; *Dent v. Auction Mart Co.* (1866), L. R., 2 Eq. 238; *Goldsmid v. Tonbridge Wells Improvement Commissioners* (1866), L. R., 1 Ch. App., 349; *Staight v. Burn* (1869),

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The foundation of the equitable jurisdiction was the violation of the legal right.

When once the legal right had been established the plaintiff became entitled as of course to an injunction to restrain the violation of it.[1]

"I apprehend," says Lord Kingsdown, in *Imperial Gas Light and Coke Company* v. *Broadbent*,[2] "that unless there "be something special in the case,[3] he is entitled as of "course to an injunction to prevent the recurrence of that "violation."

Imperial Gas Light and Coke Co. v. *Broadbent.*

And in *Staight* v. *Burn*[4] Gifford, L.J., says: "I take the "course of this Court to be, that when there is a material "injury to that which is a clear legal right, and it appears "that damages, from the nature of the case, would not be "a complete compensation, the Court will interfere by "injunction."

Staight v. *Burn.*

The power given to the Courts of Chancery by Lord Cairns' Act to award damages in addition to, or in substitution for, an injunction,[5] was a discretionary one, but the conditions of its exercise were not defined by fixed rules owing to the disinclination of the Judges to tie the hands of the Court.[6]

The furthest they would go was to say that the discretion

L. R., 3 Ch. App., 163; *Aynsley* v. *Glover* (1874), L. R., 18 Eq., 544; L. R., 10 Ch. App., 283; and *see* the history of the equitable jurisdiction of the Court of Chancery narrated in *Ratanji H. Bottlewalla* v. *Edulji H. Bottlewalla* (1871), 8 Bom., H. C., O. C. J., 181; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35; *Dhunjibhoy* v. *Lisbon* (1888), I. L. R., 13 Bom., 252; *Ghanashem* v. *Morobo* (1894), I. L. R., 18 Bom., 474. And as to presumption of substantial damage from invasion of the legal right, *see supra*, Part I, p. 596.

[1] *Imperial Gas Light and Coke Co.* v. *Broadbent* (1859), 7 H. L. C., 600 (612); and *see Smith* v. *Smith* (1875), L. R., 20 Eq., 500 (505); *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287; *Cooper* v. *Laidler* (1903), 1 Ch., 337 (340).

[2] *Ubi sup.*

[3] The words "something special in the case" refer to laches or to a merely trivial or occasional interference with the right, *Cooper* v. *Laidler*, *ubi sup.* at p. 341. As to laches, *see* further *infra*, D.

[4] (1869), L. R., 5 Ch. App., 163 (167).

[5] *See supra*, 4 (*a*), p. 614.

[6] *Aynsley* v. *Glover* (1874), L. R., 18 Eq., 545 (554 *et seq.*); *Holland* v. *Worley* (1884), 26 Ch. D., 578; *Ghanashem* v. *Morobo* (1894), L. R., 18 Bom., 474 (487).

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was a reasonable discretion depending for the manner of its exercise on the particular circumstances of each case.[1]

It seems clear, however, that the Act was not intended to interfere with the well-settled principles upon which Courts of Equity had been in the habit of granting injunctions, and that in the exercise of its statutory jurisdiction the Court of Chancery felt itself bound to adhere as far as possible to the pre-established practice.[2]

Aynsley v. *Glover.*

The effect of Lord Cairns' Act on the jurisdiction of the Chancery Courts is discussed by Jessel, M.R., in *Aynsley* v. *Glover*.[3] He says[4]—

"It will deserve the most serious consideration hereafter "as to what class or classes of cases this enactment is to be "held to apply. Although, in terms so wide and so long, it "never could have been meant, and I do not suppose it will "ever be held to mean, that in all cases the Court, of its own "will and pleasure or at its own mere caprice, will substitute "damages for an injunction. . . ."

"I am not now going, and I do not suppose that any Judge "will ever do so, to lay down a rule which, so to say, will tie "the hands of the Court. The discretion, being a reasonable "discretion, should, I think, be reasonably exercised, and it "must depend upon the special circumstances of each case "whether it ought to be exercised. The power has been "conferred, no doubt usefully, to avoid the oppression which "is sometimes practised in these suits by a plaintiff who is "enabled—I do not like to use the word 'extort,' but—to "obtain a very large sum of money from a defendant merely "because the plaintiff has a legal right to an injunction. "I think the enactment was meant in some sense or another "to prevent that course being successfully adopted. But "there may be some other special cases to which the Act may

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[1] *Aynsley* v. *Glover*, *ubi sup.*; *Greenwood* v. *Hornsey* (1886), 33 Ch. D., 471 (476); 55 L. T. 135 (137); *Dicker* v. *Popham Radford & Co.* (1890), 63 L. T., 379 (381); *Martin* v. *Price* (1894), 1 Ch., 276 (280).

[2] *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287.

[3] (1874) L. R., 18 Eq., 544.

[4] *Ibid.* at p. 555.

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"be safely applied, and I do not intend to lay down any rule "upon the subject."

In the same case the Master of the Rolls laid it down as a general rule that whefever an action could be maintained at law and really substantial or considerable damages could be recovered, there an injunction ought to follow in equity.[1]

In *Smith* v. *Smith*[2] the same judge says: "Then what *Smith* v. *Smith*. "difference was introduced by *Lord Cairns' Act*? Before the "Act it was a matter of right to obtain the injunction. By "that Act the Court had a discretion to substitute damages "where it thought proper. Now this discretion must be a "judicial discretion,[3] exercised according to something like a "settled rule, and in such a way as to prevent the defendant "doing a wrongful act, and thinking he could pay damages "for it."

Such, in brief, were the principles upon which the Court of Chancery exercised its jurisdiction at the time of the passing of the Specific Relief Act, I of 1877.

The provisions of that enactment in relation to relief by injunction or damages are as follows:— *Specific Relief Act, I of 1877.*

Section 52.—By this section it is enacted that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.[4]

Section 53.—By this section it is enacted that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; and that the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.[5]

Section 54.—This section provides that when the defendant invades or threatens to invade the plaintiff's right to, or

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[1] *Ubi supra* at pp. 357, 358. *See* also *Doyle* v. *Auction Mart Co.* (1869), L. R., 5 Eq., 338 (340). But since *Colls' case* this can hardly be regarded as a satisfactory test, *see* (1904) App. Cas., 179, 192, 193, and *Kine* v. *Jolly* (1905), 1 Ch., 480, affirmed (1907) App. Cas., 1.

[2] (1875) L. R., 20 Eq., 500 (505).

[3] *See* also *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (193).

[4] *See* App. V. As to relief by temporary injunction, *see supra*, 4 (5), p. 615.

[5] *See* App. V.

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enjoyment of, property, the Court may grant a perpetual injunction, in, amongst others, the following cases (that is to "say): "where there exists no standard for ascertaining the "actual damage caused, or likely to be caused, by the in-"vasion"[1]; and where the invasion is such that pecuniary "compensation would not afford adequate relief"[2]; and "where "it is probable that pecuniary compensation cannot be got for "the invasion"[3]; and "where the injunction is necessary to "prevent a multiplicity of judicial proceedings."[4]

Section 55.—This section provides for relief by mandatory injunction by enacting that when, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.[5]

I. E. Act, V of 1882, s. 35.

Subject to these provisions, and the further provisions contained in sections 56 and 57 of the same Act,[6] an injunction may be granted under section 35 of the Indian Easements Act, V of 1882,[7] to restrain the disturbance of an easement—

(*a*) if the easement is actually disturbed—when compensation for such disturbance might be recovered under Chapter IV[8];

(*b*) if the disturbance is only threatened or intended —when the act threatened or intended must necessarily, if performed, disturb the easement.[9]

Nature, origin, and effect of provisions of Specific Relief Act, and

It may be useful to formulate, in a series of propositions, the nature, origin, and effect of the above provisions of the Specific Relief Act and the principles by which Courts in

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[1] Cl. (*b*), *see* App. V.

[2] Cl. (*c*), *see* App. V.

[3] Cl. (*d*), *see* App. V.

[4] Cl. (*e*), *see* App. V. And *see Atty.-Genl.* v. *Council of Borough of Birmingham* (1858), 4 K. & J., 528 (546); *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), L. R., 8 Ch. App., 125 (142); *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35 (68); *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (188).

[5] *See* App. V.

[6] *See* App. V, and *infra*, p. 625, notes 1 and 3, p. 630, note 3.

[7] *See* App. VII.

[8] *See* further *infra*, pp. 631, 639.

[9] *See* App. VII, and *infra* B (6). p. 629.

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India should be guided in granting relief for the disturbance of easements.

general principles upon which relief granted in India for the disturbance of easements.

A.—In applying these statutory provisions Courts in India should be guided by the decisions of the Courts of Chancery in England which are the source from which they have been drawn.[1]

B.—As to Perpetual Injunctions.

(1) The limitation contained in clause (*c*) of section 54 of the Specific Relief Act, (which section deals with perpetual injunctions), is identical with the principles upon which Courts of Chancery have proceeded in England.[2]

(2) The question whether in any particular case damages are a sufficient compensation does not present itself to the Courts of this country in precisely the same manner and form as it does to a Court of Equity in England, inasmuch as the latter Court in awarding damages under Lord Cairns' Act exercises a discretionary power in departing from the injunctive relief it had hitherto exclusively afforded, whilst, in India, the Court has to take a broader view, it being its "duty" not to grant a perpetual injunction where damages afford adequate compensation.[3]

The respective positions therefore amount to this, that in the one case the statutory discretion is as to the damages, and in the other, as to the injunction.[4]

Wood v. *Sutcliffe.*

(3) The expression "adequate relief" is not defined in the Specific Relief Act, but it is probably there used in the same sense as by Kindersley, V.C., in *Wood* v. *Sutcliffe*,[5] as meaning such a compensation

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[1] *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35 (67).

[2] *Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., 252 (259).

[3] *Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., 252 (261); *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., 474 (488); *Boyson* v. *Deane* (1898), I. L. R., 22 Mad., 251.

[4] *Ibid.*

[5] (1851) 2 Sim. N. S., 163 (165); 21 L. J. Ch., 253 (255). And *see* this subject further discussed *infra* with reference to easements of light and air.

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as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before.[1]

(4) Though the foregoing definition may in some cases prevent the possibility of awarding damages, the plaintiff is not in such cases necessarily entitled to an injunction inasmuch as the discretion created by the Act has still to be exercised, and in exercising such discretion the Court must consider not only the nature of the disturbance, but whether an injunction would be a proper and appropriate remedy for such disturbance.[2]

(5) Where an actionable nuisance has already been committed the question whether the remedy should take the form of a perpetual injunction or damages appears to be determinable as follows:—

(*a*) Where the disturbance is slight and the injury sustained is trifling[3]; or where the disturbance is temporary, either from the nature of the disturbance itself,[4] or from conditions affecting the dominant tenement[5]; or where the action is vexatious and oppressive[6]: or where the plaintiff has by

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[1] *Ghanasham* v. *Moroba*, *ubi sup.*; and *see Boyson* v. *Deane* (1899), I. L. R., 22 Mad., 251. But in relation to easements of light and air, if such be the correct meaning of the phrase, it would be difficult to say that pecuniary compensation for an actionable obstruction of ancient lights would have that effect, except where money might be spent in the structural alteration or rearrangement of the premises, *Ghanasham* v. *Moroba*, *ubi sup.* at p. 488.

[2] *Ghanasham* v. *Moroba*, *ubi sup.*; and *see Boyson* v. *Deane*, *ubi sup.*

[3] *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., 474 (488); *Herz* v. *Union Bank of London* (1859), 2 Giff., 686; *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238 (249); *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287 (317) (322); *Cowper* v. *Laidler* (1903), 2 Ch., 337 (342); and *see Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (212).

[4] *Swaine* v. *G. N. Ry. Co.* (1864), 10 Jur. N. S., 191; *Cooke* v. *Forbes* (1867), L. R., 5 Eq., 166; *Shelfer* v. *City of London Electric Lighting Co.*; *Cowper* v. *Laidler*, *ubi sup.*

[5] *Dent* v. *Auction Mart Co.*, *ubi sup.* at p. 247.

[6] *Shelfer* v. *City of London Electric Lighting Co.*, *ubi sup.*; *Colls* v. *Home and Colonial Stores, Ltd.*, *ubi sup.* at pp. 193, 212.

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his own conduct forfeited his right to an injunction[1]; and in all cases where damages are really an adequate remedy,[2] a perpetual injunction ought not to be granted.

(*b*) Where, on the other hand, the injury is permanent and serious, and is of such a nature as to be incapable of adequate compensation in money, or where an injunction is necessary to prevent a multiplicity of judicial proceedings, the injunction ought to be granted.[3]

(6) An injunction may be awarded to restrain an injury not yet committed, but only threatened or intended.[4]

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[1] *Shelfer* v. *City of London Electric Lighting Co.*, *ubi sup.*; and *see Cowper* v. *Laidler*, *ubi sup.*; *Anath Nath Deb* v. *Galstaun* (1908), I. L. R., 35 Cal., 661; Spec. Rel. Act, I of 1877, s. 56 (*j*), and *infra* as to laches, D, p. 635.

[2] As where the nuisance is already at an end, *Shelfer* v. *City of London Electric Lighting Co.*, *ubi sup.* at p. 317, or where in cases of light and air the obstruction is not so serious as altogether or substantially to destroy the utility of the dominant tenement, but is still sufficient to entitle the plaintiff to relief, *see Ghanasham* v. *Moroba*, *ubi sup.*; *Dhunjibhoy* v. *Lisboa* (1889), I. L. R., 13 Bom., 252; *Sultan Nawaz Jung* v. *Rustomji Nanabhoy* (1896), I. L. R., 20 Bom., 704; *Boyson* v. *Deane* (1899), I. L. R., 22 Mad., 251. In such cases there does not appear to be an insuperable difficulty in assessing pecuniary compensation, *see Ghanasham* v. *Moroba*, *ubi sup.* at p. 489.

[3] *Ponnusamivi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1884), I. L. R., 8 Bom., 35; *Nandkishor* v. *Bhagubhai* (1884), I. L. R., 8 Bom., 95; *Kadarbhai* v. *Rahimbhai* (1889), I. L. R., 13 Bom., 674; *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee* (1904), I. L. R., 31 Cal., 944; *Anderson* v. *Hardut Roy Chamaria* (1905), 9 Cal. W. N., 543; and *see* Spec. Rel. Act, I of 1877, s. 54 (*e*), s. 56 (*a*), App. V. This rule has been applied in cases of light and air where the utility of the dominant tenement has been absolutely or substantially destroyed on the ground that to give damages instead of an injunction would be to compel the plaintiff to sell his easement to the defendant, *see Nandkishor* v. *Bhagubhai*; *Kadarbhai* v. *Rahimbhai*; *Ghanasham* v. *Moroba*, *ubi sup.*; *Kristodhone Mitter* v. *Nandarani Dassee* (1908), I. L. R., 35 Cal., 889. This is in accordance with English principles, *see Dent* v. *Auction Mart Co.*, *ubi sup.* at p. 246; *Aynsley* v. *Glover* (1874), L. R., 18 Eq., 544 (552); *Smith* v. *Smith* (1875), L. R., 20 Eq., 500 (505); *Greenwood* v. *Hornsey* (1886), 33 Ch. D., 471 (477); 55 T. L., 135; *Shelfer* v. *City of London Electric Lighting Co.*; *Cowper* v. *Laidler*, *ubi sup.*; *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (193).

[4] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1866), L. R., 1 Ch. App., 349; *Corporation of Birmingham* v. *Allen* (1877), 6 Ch. D., 284 (287); *Siddons* v. *Short* (1877), 2 C. P. D.,

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In such a case the question whether or not the Court will interfere by injunction must depend upon the nature and extent of the apprehended mischief and upon the certainty or uncertainty of its arising and continuing,[1] and upon the applicability or inapplicability of clauses (*c*) and (*d*) of section 54 of the Specific Relief Act.[2]

Corporation of Birmingham v. Allen.

And before an injunction will be granted it must be shewn that the threatened or intended act will, when committed, inevitably result in a nuisance,[3] and a much stronger and clearer case must be made out than where damage has actually occurred,[4] because, as says Jessel, M.R., in *Corporation of Birmingham* v. *Allen*,[5] "in the one case you have no facts to "go by, but only opinion, and in the other case you have "actual facts to go by."

It should be observed that, in India generally, the discretion given to Courts by section 54 of the Specific Relief Act to grant an injunction to restrain the threatened invasion of an easement will only arise in cases which do not fall within clauses (*c*) and (*d*) of that section in respect to relief by pecuniary compensation,[6] and that the question whether or not in any particular case the discretion can be said to arise, is governed by the same considerations as in cases of nuisances actually committed.[7]

572; *Martin* v. *Price* (1894), 1 Ch., 276; *Cowper* v. *Laidler* (1903), 2 Ch., 337; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35; *Bindu Basini Chowdhrani* v. *Jahnabi Chowdhrani* (1896), I. L. R., 24 Cal., 260; *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee* (1904), I. L. R., 31 Cal., 944; and *see supra*, p. 190, note 3; and I. E. Act, s. 35, App. VII.

[1] *See Goldsmid* v. *Tonbridge Wells Improvement Commissioners*, *ubi sup.* at p. 354; *Land Mortgage Bank of India* v. *Ahmedbhoy*, *ubi sup.* at pp. 68, 69.

[2] *See Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., 252. For the text of the Act, *see supra* and App. V.

[3] *See* the authorities cited *supra*, p. 190, note 3. "Inevitably" does not mean that the non-occurrence of the injury must be impossible, but that the injury will in all human probability occur. *Bindu Basini Chowdhrani* v. *Jahnabi Chowdhrani*, *ubi sup.*; and *see Siddons* v. *Short*, *ubi sup.* at p. 577. And s. 56 (*g*) of the Spec. Rel. Act, I of 1877, provides that an injunction cannot be granted to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance.

[4] *Corporation of Birmingham* v. *Allen*, *ubi sup.*

[5] *Ibid.* at p. 288.

[6] For the terms of the section, *see* App. V.

[7] *See Dhunjibhoy* v. *Lisboa*, *ubi sup.*

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In England, on the contrary, it is apparently still an open question whether the Court has jurisdiction under Lord Cairns' Act to award damages instead of an injunction,[1] but the weight of opinion appears to lie against the existence of such jurisdiction,[2] and there seems to have been only one case in which damages were given instead of a prohibitory injunction.[3]

In the Indian Easements Act there is no provision for the recovery of compensation or damages for a threatened injury. In that Act the provisions dealing with compensation for the disturbance of an easement are applicable only to cases where the disturbance has actually occurred.[4]

But by section 35, clause (*b*), of the same Act an injunction may, subject to the provisions of the Specific Relief Act, be granted to restrain a disturbance which is only threatened and intended when the act, if committed, must necessarily disturb the easement.[5]

C.—As to Mandatory Injunctions.

"It is in the discretion of the Court to grant or withhold a mandatory injunction according to the particular circumstances of each case.[6]

As to how such discretion should be exercised the authorities appear to establish the following propositions :—

(1) A mandatory injunction is granted generally upon the same principles and subject to the same considerations as a perpetual injunction.[7]

(2) Thus, as a general rule, where damages are an adequate compensation, a mandatory injunction will not be granted.[8]

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[1] *See Chamaukhun v. Moroba*, *ubi sup.*

[2] *See Cooper v. Laidler*, *ubi sup.*, and the cases there referred to.

[3] *i.e.* in *Holland v. Worley* (1884), 26 Ch. D., 578; *see Cooper v. Laidler*, *ubi sup.*

[4] *See* s. 33, App. VII, and *Chamaukhun v. Moroba*, *ubi sup.* at p. 487.

[5] *See* App. VII.

[6] *See* s. 55 of Spec. Rel. Act I of 1877, App. V.

[7] *Lakshmi Narain Banerjee v. Tara Prosanna Banerjee* (1904), I. L. R., 31 Cal. at p. 949.

[8] *Bagram v. Khettra Nath Kanformah* (1869), 3 B. L. R. (O. C. J.), at p. 45;

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(3) The test of under what conditions adequate relief can be afforded by pecuniary compensation is difficult of precise definition, as every case of actionable disturbance must depend on its own circumstances and vary in degree, but so far as it is possible to deduce any principle of general application from the decisions, it seems that where the damage caused by the disturbance is not irremediable, or where the comfort or utility of the dominant tenement has not been destroyed or very substantially diminished, the Court will usually award damages instead of granting an injunction [1]; but where the case is one of irreparable or very substantial injury a mandatory injunction, and not damages, will be granted.[2]

(4) But in every case the Court has a discretion under section 55 of the Specific Relief Act, I of 1877, to grant a mandatory injunction according to all the circumstances before it, for it was never intended by the Legislature to lay down the fixed rule that an injunction should not be granted unless the plaintiff's property would otherwise be practically destroyed.[3]

Bottlewalla v. *Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.), 181; *Ranchhod Jamnadas* v. *Lallu Haribhai* (1873), 10 Bom. H. C., 95; *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., 474; *Boyson* v. *Deane* (1899), I. L. R., 22 Mad., 251; *Kalliandas* v. *Tulsidas* (1899), I. L. R., 23 Bom., 786.

[1] *See* the cases cited in the last footnote. In this respect the Indian decisions are in conformity with the views expressed by the House of Lords in *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179, 192, 193, and given effect to by the Court of Appeal in *Kine* v. *Jolly* (1905), 1 Ch., 480, 495, 496, 503, 504 (affirmed (1907), App. Cas., 1), that the Court ought now to be less free than formerly in granting mandatory injunctions. But where damages instead of an injunction would otherwise be given the conduct of the defendant may entitle the plaintiff to an injunction, *see infra*, p. 634.

[2] *Provabutty Dabee* v. *Mohendro Lall Bose* (1881), I. L. R., 7 Cal., 453; *Nandkishor* v. *Bhagubai* (1884), I. L. R., 8 Bom., 95; *Yaro* v. *Sana-ullah* (1897), I. L. R., 19 All., 259; *Anderson* v. *Hardut Roy Chamaria* (1905), 9 Cal. W. N., 543; *Kristodhone Mitter* v. *Nandarani Dassee* (1908), I. L. R., 35 Cal., 889. In the case last cited the Court, in granting a mandatory injunction, took into consideration the circumstance that the obstruction was a purely temporary one, *i.e.* a wall erected for the sole purpose of preventing the acquisition of an easement in future.

[3] *Yaro* v. *Sana-ullah*, *ubi sup.*

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(5) Independently of special circumstances, such as laches on the part of the plaintiff,[1] or unfairness or sharp practice on the part of the defendant,[2] High Courts in India, being Courts both of law and equity, should, in exercising their discretion to grant or withhold a mandatory injunction, consider not only the extent of the injury inflicted on the plaintiff, but the amount laid out by the defendant.[3]

(6) If the plaintiff comes to the Court as soon as possible after the commencement of the obstruction or as soon as it is apparent to him that the obstruction will interfere with his easement, and a mandatory injunction is found to be necessary, such injunction will be granted.[4]

(7) If the plaintiff neglects to seek the assistance of the Court until after the obstruction complained of has been completed, as in the case of a building obstructing ancient lights, the Court will, as a general rule, withhold the mandatory injunction and grant compensation in damages, except in cases where extreme or very serious injury would be caused to the plaintiff by the refusal of the injunction, or where other special circumstances call for mandatory relief.[5]

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[1] *See infra*, p. 635.

[2] *See infra*, p. 634.

[3] *Dhunjibhoy* v. *Lisboa*, *ubi sup.* at p. 261; *Ghanasham* v. *Moroba*, *ubi sup.* at p. 484; and *see Anath Nath Deb* v. *Galstaun* (1908), I. L. R., 35 Cal., 661. This is in accordance with English principles, *see Curriers' Co.* v. *Corbett* (1865), 2 Dr. & Sm., 355 (360); *Smith* v. *Smith* (1875), L. R., 20 Eq., 500 (505); *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1876), 6 Ch. D., 757 (768); *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287 (323).

[4] *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238; *Aynsley* v. *Glover* (1874), L. R., 18 Eq., 544; *Smith* v. *Smith* (1875), L. R., 20 Eq., 500; *Krehl* v. *Burrell* (1877), 7 Ch. D., 551; *Greenwood* v. *Hornsey* (1886), 33 Ch. D., 471; 55 L. T., 135; *Benode Coomaree Dossee* v. *Soudaminey Dossee* (1889), L. R., 16 Cal., 252 (264).

[5] *Isenberg* v. *East Indian House Estate Co.* (1864), 10 Jur. N. S., 221; *Durell* v. *Pritchard* (1865), L. R., 1 Ch. App., 244; *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App., 212; *Stanley of Alderly* v. *Shrewsbury* (1875), L. R., 19 Eq., 616; *Benode Coomaree Dossee* v. *Soudaminey Dossee* (1889), I. L. R.,

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(8) Where there has been no laches on the part of the plaintiff in coming to the Court, and where the defendant has been guilty of unfairness or sharp practice, or has endeavoured to evade the jurisdiction of the Court, a mandatory injunction will be granted.[1]

To withhold it would be to compel the plaintiff to sell his easement at a valuation.[2]

(9) Where the circumstances of a case so require, a mandatory injunction as well as a preventive or perpetual injunction can be granted.[3]

(10) When a mandatory injunction is granted under section 55 of the Specific Relief Act, I of 1877, two elements have to be taken into consideration; in the

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16 Cal., 252 (265); *Abdul Rahman* v. *Emile* (1893), I. L. R., 16 All., 69 (72). But mere notice not to continue building so as to obstruct the plaintiff's right is not, when not followed by legal proceedings, a special circumstance justifying departure from the usual rule, *Benode Coomaree Dossee* v. *Soudaminey Dossee*, *ubi sup.*

[1] *Bhuban Mohan Banerjee* v. *Elliott* (1870), 6 B. L. R., 85; *Bottlewalla* v. *Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.), 181 (195) (196); *Nandkishor* v. *Bhagubhai* (1884), I. L. R., 8 Bom., 95 (97); and *see Provabutty Dabee* v. *Mohendro Lall Bose* (1881), I. L. R., 7 Cal., 453; *Benode Coomaree Dossee* v. *Soudaminey Dossee*, *ubi sup.* For the English decisions, *see Smith* v. *Smith* (1875), L. R., 20 Eq., 500; *Krehl* v. *Burrell* (1877), 7 Ch. D., 551; 11 Ch. D., 146; *Gaskin* v. *Balls* (1879), 13 Ch. D., 324; *Greenwood* v. *Hornsey* (1886), 33 Ch. D., 471; 55 L. T., 135; *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287 (323); *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179 (193); *Kine* v. *Jolly* (1905), 1 Ch., 480, 495, 496, 503, 504; Gale on Easements, 8th Ed., p. 610. For cases where a mandatory injunction has been granted in respect of buildings erected *pendente lite*, *see Kadarbhai* v. *Rahimbhai* (1889), I. L. R., 13 Bom., 674; *Kelk* v. *Pearson* (1871), L. R., 6 Ch. App., 809; *Smith* v. *Smith*, *ubi sup.*; *Mackey* v. *Scottish Widows Fund Assurance Society* (1876), Ir. R., 10 Eq., 114; 24 W. R. Dig., 96; *Krehl* v. *Burrell*, *ubi sup.*; *Gaskin* v. *Balls*, *ubi sup.*; *Smith* v. *Day* (1880), 13 Ch. D., 651; *Greenwood* v. *Hornsey*, *ubi sup.*; *Daniel* v. *Ferguson* (1891), 2 Ch., 27; *Von Joel* v. *Hornsey* (1895), 2 Ch., 774.

[2] *Smith* v. *Smith*; *Krehl* v. *Burrell*, *ubi sup.*

[3] *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238; *Bottlewalla* v. *Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.), 181; *Jamnadas* v. *Atmaram* (1877), I. L. R., 2 Bom., 133; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35; *Abdul Hakim* v. *Gonesh Dutt* (1885), I. L. R., 12 Cal., 323; *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee* (1904), I. L. R., 31 Cal., 944; *Chotalal Mohanlal* v. *Lallabhai Surchand* (1904), I. L. R., 29 Bom., 157.

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first place, the Court has to determine what acts are necessary in order to prevent a breach of the obligation; in the second place, the requisite acts must be such as the Court is capable of enforcing.[1]

(11) A mandatory injunction, if granted, will be limited to removing so much only of the obstruction as interferes with the easement.[2]

D.—Delay and Laches.

The question whether there has been delay or laches on the part of a plaintiff in coming into Court is one of fact, and must depend on the particular circumstances of each case. The effect of such delay or laches on the plaintiff's right to relief is a question of law and appears to resolve itself into the following propositions:—

(1) Mere delay in taking proceedings is not of itself a bar to equitable relief,[3] but where the delay amounts to laches and the defendant has changed his position, acquiescence will be presumed and an injunction, whether preventive or mandatory, will be refused.[4]

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[1] *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee, ubi sup.* at p. 949.

[2] Specific Relief Act, s. 55, ills. (*a*) and (*b*), App. V; *Jamnadas* v. *Atmaram, ubi sup.*; *Provabutty Dabee* v. *Mohendro Lall Bose* (1881), I. L. R., 7 Cal., 453 (460); *Abdul Hakim* v. *Gonesh Dutt* (1885), I. L. R., 12 Cal., 323; *Bala* v. *Maharu* (1896), I. L. R., 20 Bom., 788; *Kristodhone Mitter* v. *Nandarani Dassee* (1908), I. L. R., 35 Cal., 889. As to cases of light and air, *see infra*, II, pp. 648, 649. It is sometimes desirable for the Court to employ a professional man agreed on by the parties or, in default, nominated by the Court, to determine how the injunction is to be given effect to in the way least injurious to the defendant, *Jamnadas* v. *Atmaram, ubi sup.*

[3] *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R., 5 P. C., 221; *Hogg* v. *Scott* (1874), L. R., 18 Eq., 444; *Jamnadas* v. *Atmaram* (1877), I. L. R., 2 Bom., 133 (138); *De Bussche* v. *Alt* (1878), 8 Ch. D., 286 (314); *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35 (85).

[4] *Cooper* v. *Hubbuck* (1860), 30 Beav., 160 (166); 7 Jur. N. S., 457; *Heera Lall Koer* v. *Purmessur Koer* (1871), 15 W. R., 401; *Jamnadas* v. *Atmaram, ubi sup.*; *De Bussche* v. *Alt, ubi sup.*; *Gaskin* v. *Balls* (1879), 13 Ch. D., 324 (328); *Chunder Coomar Mukerji* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665 (673); *Land Mortgage Bank of India* v. *Ahmedbhoy, ubi sup.*; *Benode Coomaree Dossee* v. *Soudaminey Dossee* (1889), I. L. R., 16 Cal., 252; and *see Anath Nath Deb* v. *Galstaun* (1908), I. L. R., 35 Cal., 661; Specific Relief Act, I of 1877, s. 56, cl. (*j*) (for the text, *see* App. V); and *supra*, p. 194. It

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Lindsay Petroleum Co. v. Hurd.

On this subject the observations of the Privy Council in *Lindsay Petroleum Company* v. *Hurd*,[1] are instructive. They say: "Now the doctrine of laches in Courts of Equity is not "an arbitrary or a technical doctrine. Where it would be "practically unjust to give a remedy either because the party "has, by his conduct, done that which might fairly be regarded "as equivalent to a waiver of it, or where by his conduct or "neglect he has, though perhaps not waiving that remedy, "yet put the other party in a situation in which it would not "be reasonable to place him if the remedy were afterwards to "be asserted, in either of these cases, lapse of time and delay "are most material. But in every case, if an argument against "relief, which otherwise would be just, is founded upon mere "delay, that delay of course not amounting to a bar by any "statute of limitations, the validity of that defence must be "tried upon principles substantially equitable. Two circum-"stances, always important in such cases, are, the length of "the delay and the nature of the acts done during the interval, "which might affect either party and cause a balance of justice "or injustice in taking the one course or the other, so far as "relates to the remedy."

De Bussche v. Alt.

And in *De Bussche* v. *Alt*[2] it was pointed out by Thesiger, L.J., that mere submission to an injury for any time short of the period limited by statute for the enforcement of the right of action for such injury cannot take away such right, although, under particular circumstances, it may amount to laches and afford a ground for refusing relief.

(2) Such laches or delay as will disentitle a plaintiff to an injunction is not necessarily a bar to the recovery of damages.[3]

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lies on the defendant to prove that the plaintiff has forfeited his right to relief by acquiescence, *Nandkishor* v. *Bhagubhai* (1884), I. L. R., 8 Bom., 95.

[1] *Ubi sup.* at p. 239, cited in *Jamnadas* v. *Atmaram* (1877), I. L. R., 2 Bom. at p. 138.

[2] (1878) 8 Ch. D. at p. 314.

[3] *Ranchhod Jamnadas* v. *Lallu Haribhai* (1873), 10 Bom. H. C., 95; *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App., 49; *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287 (322).

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But, in such case, damages, if awarded, are a final remedy, and will prevent any recurring right of action.[1]

E.—Further general principles.

(1) Where a plaintiff sues for an injunction or for such other relief as the Court may think fit to grant, and his remedy is found to lie in damages, the Court should not dismiss the suit and refer the plaintiff to a fresh suit for damages, but should itself take evidence and find what pecuniary compensation the plaintiff is entitled to recover for the injury complained of and proved.[2]

(2) An inquiry as to damages will not be directed where the plaintiff has opened a case of substantial damage and has failed to prove it.[3]

(3) When a plaintiff has established his right to an injunction he ought not to be deprived of it on the ground that the public will be injured if it is granted.[4]

(4) In the case of an actionable disturbance the fact that the plaintiff has himself contributed thereto should not in itself preclude him from obtaining an injunction against the person causing the disturbance.[5]

F.—As to clause (b) of section 54 of Specific Relief Act, I of 1877.

This clause is, apparently, not intended to lay down a rule applicable to easements, but rather to apply to such cases as are referred to in illustrations (*h*) and (*i*) to the section.[6]

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[1] *City of London Brewery Co.* v. *Tennant*, *ubi sup.*

[2] *Kalliandas* v. *Tulsidas* (1899), I. L. R., 23 Bom., 786; or where the Court is not in itself in a position to assess the amount of damages it will in accordance with the usual practice direct an inquiry, *see Kine* v. *Jolly* (1905), 1 Ch., 480; *Anath Nath Deb* v. *Galstaun* (1908), I. L. R., 35 Cal., 661.

[3] *Kino* v. *Rudkin* (1877), 6 Ch. D., 160.

[4] *Imperial Gas Light and Coal Co.* v. *Broadbent* (1856–1859), 7 De G. M. & G., 436 (462); 7 H. L. C., 600 (610); *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287, 315, 316.

[5] *Staight* v. *Burn* (1869), L. R., 5 Ch. App., 163.

[6] *See Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., 474 (489). For the text of these illustrations, *see* App. V.

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G.—Penalty for breach of injunction.

When once an injunction has been granted, the person committing a breach thereof renders himself liable to committal.[1]

H.—Relief for breach of covenant creating easement.

Where a right does not arise as an ordinary easement but as a special right created by covenant, a Court of Equity will grant an injunction for its actual or intended disturbance without regard to the amount of damage sustained.[2]

Leech v. *Schweder*.

In *Leech* v. *Schweder*, Mellish, L.J., said[3]: "Of course it "would be possible to insert in any covenant words which "would increase the right of the covenantee to damages at law "if his rights were violated, and would entitle him to an "injunction in equity to enforce that right. For instance, it "might be said in a covenant that the lessee should freely "enjoy the house, with an uninterrupted view from the "drawing-room windows over all the existing land of the "lessor. If that were inserted, no doubt it would give a "larger right than had previously been granted, and damages "might be recovered at law if the lessor broke that covenant, "and a Court of Equity would grant an injunction against the "lessor if he were intending to break it, and no doubt would "also grant an injunction against the person claiming under "the lessor if he took with notice of the covenant."[4]

I.—Agreement preventing acquisition of easement.

Conversely, if there is an agreement preventing the acquisition of an easement the Court will not grant relief for an obstruction created under such agreement.[5]

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[1] *Pranjivandas* v. *Meyaram* (1864), 1 Bom., H. C., 148. As to breach of injunction, *see* further, Kerr on Injunctions, 4th Ed., pp. 593 *et seq.*; Woodroffe on The Law relating to Injunctions, pp. 87 *et seq.*

[2] *Leech* v. *Schweder* (1874), L. R., 9 Ch. App., 463; and *see Rolason* v. *Levy* (1868), 17 L. T., 641; *Allen* v. *Seckham* (1878), 47 L. J. Ch., 742.

[3] *Ubi sup.* at p. 474.

[4] The instance given here is of a right not amounting to an easement, but the same principle would apply to the case of an easement.

[5] *See* I. E. Act, s. 15, Expl. I, App. VII, and *Sultan Nawaz Jung* v. *Rustomji Nanabhoy* (1896), I. L. R., 20 Bom., 704;

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J.—Statutory relief by damages.

Under section 33 of the Indian Easements Act, V of 1882, the owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto: provided that the disturbance has actually caused substantial damage to the plaintiff.[1]

"Substantial damage" is defined by Explanations I, II, and III to the same section.[2]

K.—As to mixed relief.

In India, both before and since the passing of the Specific Relief Act, I of 1877, it has been open to the Court to grant mixed relief by injunction, perpetual or mandatory, or both, and damages where the circumstances of the particular case so required[3]; and in cases of continuing actionable nuisance a combined preventive and mandatory injunction is ordinarily the proper remedy.[4]

II.—In Cases of Light and Air.

Since by far the greater number of cases relating to the disturbance of easements are cases of light and air, it is thought that this part of the present chapter may be appropriately concluded (*a*) by a short summary of the Indian decisions dealing with the question of relief by injunction or damages for the actionable disturbance of easements of light and air, and (*b*) by reference to certain

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(1899) I. L. R., 24 Bom. (P. C.), 156; L. R., 26 Ind. App., 184.

[1] *See* App. VII; and *supra*, proposition B (6).

[2] *See* App. VII.

[3] *Jagnnadas* v. *Atmaram* (1877), I. L. R., 2 Bom., 133; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35; *Abdul Hakim* v. *Gonesh Dutt* (1885), I. L. R., 12 Cal., 323; and *see* *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee* (1904), I. L. R., 31 Cal., 944; *Chotalal Mohanlal* v. *Lallabhai Surchand* (1904), I. L. R., 29 Bom., 157.

[4] *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee*, *ubi sup.* at pp. 948, 949. This is of course subject to damages being an adequate remedy, *see supra*, propositions B and C.

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considerations of practical importance and utility (1) in determining questions as to the degree of diminution of light and air in cases of doubt or controversy and the extent of the injury thereby caused, and (2) in the framing of an injunction in general terms to restrain an illegal obstruction.

A.—Summary of Indian decisions as to relief by injunction or damages.

Modhoosoodun Dey v. Bissonauth Dey.

In *Modhoosoodun Dey* v. *Bissonauth Dey*[1] there was a threatened complete obstruction of ancient lights and a *preventive* injunction was granted.

Jamnadas v. Atmaram.

In *Jamnadas* v. *Atmaram*[2] the defendants, in spite of repeated notice and warning from the plaintiff, had continued to build their new house only one foot away from the plaintiff's ancient house, until they had raised it higher than the plaintiff's building and thereby darkened some of the principal rooms therein, making them unfit for occupation during the day without artificial light. *Mandatory* injunction allowed.

Provabutty Dabee v. Mohendro Lall Bose.

In *Provabutty Dabee* v. *Mohendro Lall Bose*,[3] the defendant, notwithstanding the plaintiff's remonstrance, began and completed a wall which totally obstructed one of the plaintiff's ancient lights. *Mandatory* injunction granted.

Nandkishor v. Bhagubhai.

In *Nandkishor* v. *Bhagubhai*[4] the plaintiff's house was higher than the defendant's shop and had a side window in the common wall dividing the two premises. The defendant raised the outer wall of his shop and thereby completely enclosed the plaintiff's window. It was held that this was an injury of so serious a nature as to be incapable of adequate relief in damages. *Mandatory* injunction granted.

Dhunjibhoy v. Lisboa.

In *Dhunjibhoy* v. *Lisboa*[5] the dispute between the parties

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[1] (1875) 15 B. L. R., 361.

[2] (1877) I. L. R., 2 Bom., 133.

[3] (1881) I. L. R., 7 Cal., 453.

[4] (1884) I. L. R., 8 Bom., 95.

[5] (1889) I. L. R., 13 Bom., 252. In this case the Court approved and acted upon the grounds stated in *Holland* v. *Worley* (1884), 26 Ch. D., 578, for giving damages instead of an injunction. The view taken in *Holland* v. *Worley*, though doubted in later English decisions in reference to the jurisdiction of the English Courts under Lord Cairns' Act (*see Greenwood* v. *Hornsey* (1886), 33 Ch. D., 471; 55 L. T., 135; *Martin* v. *Price* (1894), 1 Ch., 276 (280); *Cowper* v. *Laidler*

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had reference to four ancient windows in the south wall of the plaintiff's house, two being on the second floor and two in a loft. At the date of the action the defendant had begun to build a house the north wall of which was about six feet distant from the plaintiff's south wall, and was intended to be sixty-four feet high, *i.e.* about twenty feet higher than the plaintiff's windows in the loft. It was proved that the obstruction would not be so serious as substantially to destroy the utility of the dominant house. Preventive injunction refused. Substantial damages (Rs.2000) awarded.

Benode Coomaree Dossee v. *Soudaminey Dossee*

In *Benode Coomaree Dossee* v. *Soudaminey Dossee*[1] the plaintiff, though he gave the defendant notice not to continue building so as to obstruct his right, delayed taking proceedings until the building had been completed. *Mandatory* injunction refused. *Damages* agreed upon between the parties.

Kadarbhai v. *Rahimbhai*

In *Kadarbhai* v. *Rahimbhai*[2] it was proved that the wall intended to be built by the defendants would so obstruct the passage of light and air through an ancient window in the plaintiff's house as to completely darken the room to which the window belonged and render it unfit for use.

On second appeal *preventive* injunction granted by first Court restored, and *mandatory* injunction granted directing the defendants to remove the wall they had raised after lower Appellate Court's decree in their favour and pending plaintiff's appeal to the High Court.

Ghanasham v. *Moroba*

In *Ghanasham* v. *Moroba*[3] the defendant had partially

(1903), 2 Ch., 337, and *supra*, 4 (*a*), p. 615), has been accepted in *Dhunjibhoy* v. *Lisboa*, *ubi sup.*, and later Indian decisions (*Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., 474; *Boyson* v. *Deane* (1899), I. L. R., 22 Mad., 251) so far as it permits of damages, instead of an injunction, being awarded in cases where the servient tenement is situated in a large and crowded city incapable of extension except vertically, and where this and other circumstances connected with the situation of the servient tenement would make an injunction disproportionably oppressive. The application of this view to cases of light and air arising in the city of Bombay is now a matter of general practice in the High Court, though the rule must still be administered with care and caution and a due regard to the special circumstances of each case, *see* *Dhunjibhoy* v. *Lisboa*; *Ghanasham* v. *Moroba*, *ubi sup.*

[1] (1889) I. L. R., 16 Cal., 252.

[2] (1889) I. L. R., 13 Bom., 674.

[3] *Ubi sup.*

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erected and intended to complete a building which though sensibly diminishing the plaintiff's light had not and could not render the plaintiff's premises substantially unfit for the purpose for which it might reasonably be expected to be used. *Preventive* and *mandatory* injunction refused. Rs.500 awarded as *damages*.

Sultan Nawaz Jung v. *Rustomji Nanabhoy.*

In *Sultan Nawaz Jung* v. *Rustomji Nanabhoy*[1] serious damage had not been caused by the obstruction; no room in the dominant tenement had been rendered uninhabitable, though two rooms had been rendered somewhat hotter and darker, causing a slight reduction in market value. *Preventive injunction* refused. *Damages* assessed by taking loss of rent at Rs.240 per annum, and allowing twenty-five years' purchase. Rs.7000 awarded in all.

Yaro v. *Sana-ullah.*

In *Yaro* v. *Sana-ullah*,[2] where the dominant tenement had been used for more than twenty years for the purposes of manufacturing a particular kind of cloth, and the defendant built so near and in such a manner as to render the dominant tenement practically useless for such purposes, *mandatory* injunction granted.

Boyson v. *Deane.*

In *Boyson* v. *Deane*[3] the damage caused by the defendant's building was comparatively small and far short of rendering the plaintiff's premises useless or seriously diminishing their selling value. Injunction, *perpetual* and *mandatory*, refused. *Damages* granted.

Anderson v. *Hardut Roy Chamaria.*

In *Anderson* v. *Hardut Roy Chamaria*[4] there had been a substantial privation of light and air, preventing the plaintiffs from carrying on their jute business as beneficially as before. *Mandatory* injunction granted.

Anath Nath Deb v. *Galstaun.*

In *Anath Nath Deb* v. *Galstaun*[5] there was such a diminution of the plaintiff's light as to amount to a nuisance,

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[1] (1896), I. L. R., 20 Bom., 714; on appeal to the Privy Council (1899), I. L. R., 24 Bom. (P. C.), 156; L. R., 26 Ind. App., 184, where the question of relief was not gone into, it being held that the plaintiff's easement was excluded by agreement.

[2] (1897) I. L. R., 19 All., 239.

[3] (1899) I. L. R., 22 Mad., 251.

[4] (1905) 9 Cal. W. N., 543.

[5] (1908) I. L. R., 35 Cal., 661.

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but as there had been considerable delay on the plaintiff's part in taking legal proceedings, and as there was a great disproportion in value between the plaintiff's and defendant's buildings, the former being a small old-fashioned house and the latter a large and expensive one, and further, as the defendant could not have complied with a mandatory injunction without pulling down the whole of his building or so much of it as would render the remainder practically useless, *mandatory* injunction refused. *Inquiry as to damages directed.*

Kristodhone Mitter v. *Nandarani Dassee.*

In *Kristodhone Mitter* v. *Nandarani Dassee*[1] ancient lights had been closed by the owner of the dominant tenement, and the defendant treating that as an abandonment erected a wall on his premises against the dominant house solely for the purpose of preventing the right being regained. It being held there was no abandonment, a *mandatory* injunction was granted.

B.—Practical considerations in determining the degree of obstruction and extent of injury thereby caused.

(1) *Rule as to angle of forty-five degrees.*

There is no rule of law that, if forty-five degrees of unobstructed light are left, there is still sufficient light for the comfortable or beneficial enjoyment of the dominant tenement and the dominant owner cannot maintain an action for the injury caused by the diminution of the light.[2]

But it is a matter of *primâ facie* evidence, and, according to experience, is, in general, a fair working rule, that no substantial injury is done or is likely to be done where an

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[1] (1908) I. L. R., 35 Cal., 889.

[2] *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App., 212; *Theed* v. *Debenham* (1876), 2 Ch. D., 165; *Ecclesiastical Commissioners* v. *Kino* (1880), 14 Ch. D., 213 (228); *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas., 179, 204, 210, 211; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839 (858); *Chotalal Mohanlal* v. *Lallabhai Surchand* (1904), I. L. R., 29 Bom., 157.

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angle of forty-five degrees is left, especially if there is good light from other directions as well.[1]

And this test may be adopted as a valuable guide in cases where the proof of obscuration is not definite or satisfactory.[2]

Beadel v. *Perry.*

In *Beadel* v. *Perry*[3] it was thought that by analogy to the principle of the Metropolitan Building Act, a wall built opposite to ancient lights to a height not greater than the distance between such wall and the ancient lights would not, under ordinary circumstances, be such a material obstruction as would necessitate relief by injunction; and in accordance with this view a mandatory injunction was granted directing the defendant to reduce his wall to an elevation not exceeding such distance.

City of London Brewery Co. v. *Tennant.*

In *City of London Brewery Company* v. *Tennant* Lord Selborne said[4]: "Further, with regard to the forty-five degrees, "there is no positive rule of law upon that subject; the cir- "cumstance that forty-five degrees are left unobstructed being "merely an element in the question of fact, whether the "access of light is unduly interfered with; but undoubtedly "there is ground for saying that if the Legislature, when "making general regulations as to buildings, considered that "when new buildings are erected, the light sufficient for "the comfortable occupation of them will, as a general rule, "be obtained if the buildings to be erected opposite to them "have not a greater angular elevation than forty-five degrees, "the fact that forty-five degrees of sky are left unobstructed "may, under ordinary circumstances, be considered *primâ* "*facie* evidence that there is not likely to be material injury; "and of course that evidence applies more strongly where "only a lateral light is partially affected and all the lights "are not obstructed. I make that observation, not imagining

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[1] *See* the English cases cited in the last note, and *Parker* v. *First Avenue Hotel* (1883), 24 Ch. D., 282; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839 (858); *Bala* v. *Maharu* (1895), I. L. R., 20 Bom., 788 (790).

[2] *Delhi and London Bank* v. *Hem Lall Dutt*, *ubi sup.*

[3] (1866) L. R., 3 Eq., 465.

[4] *Ubi sup.* at p. 220.

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"that either at law or in this Court any judge has ever meant "to lay down as a general proposition that there can be no "material injury to light if forty-five degrees of sky are left "open; ~~but~~ I am of opinion that if forty-five degrees are left, "this is some *primâ facie* evidence of the light not being "obstructed to such an extent as to call for the interference of "the Court—evidence which requires to be rebutted by direct "evidence of injury."[1]

(2) *Other matters of evidence.*

Expert reports. *Colls* v. *Home and Colonial Stores, Ltd.*

(*a*) The suggestion made by Lord Macnaghten in *Colls* v. *Home and Colonial Stores, Limited*,[2] that judges who exercise the functions of both judge and jury might often usefully avail themselves of the assistance of independent and experienced surveyors in reporting upon the degree of diminution which a plaintiff's ancient light and air has undergone, is obviously of practical value to Indian tribunals in cases arising in the Presidency towns or other large cities of India.

He says[3]: "It will be observed that in *Back* v. *Stacey*[4] the "learned judge told the jury who had viewed the premises "that they were to judge rather from their own ocular "observation than from the testimony of any witnesses, how-"ever respectable, of the degree of diminution which the "plaintiff's ancient light had undergone. Now, a judge who "exercises the functions of both judge and jury cannot be "expected to view the premises himself, even if he considers "himself an expert in such matters. But I have often "wondered why the Court does not more frequently avail itself "of the power of calling in a competent adviser to report to "the Court upon the question. There are plenty of experi-"enced surveyors accustomed to deal with large properties "in London who might be trusted to make a perfectly fair

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[1] Approved by Lord Davey in *Colls* v. *Home and Colonial Stores, Ltd.*, *ubi sup.* at p. 204.

[2] (1904) App. Cas., 179.

[3] *Ubi sup.* at p. 192.

[4] (1826), 2 C. & P., 465; 31 R. R., 679.

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"and impartial report, subject, of course, to examination in "Court if required."

Irrelevant evidence.

(b) Upon the question of what is relevant evidence in an inquiry into the effect that a particular obstruction has had upon the comfortable or beneficial occupation of the dominant tenement, it seems abundantly clear that any evidence directed to proving that, notwithstanding a substantial diminution of light and air amounting to a nuisance, the plaintiff's premises are still better lighted than, or as well lighted as, many other premises similarly situated is irrelevant and inadmissible.

This proposition is almost self-evident. Any such comparative test must be obviously unreliable and unsatisfactory and capable of serious inconvenience and hardship to the plaintiff, who might thus find himself compelled to adopt a peculiar and fanciful standard of enjoyment wholly unsuited to his particular requirements.

Colls v. *Home and Colonial Stores, Ltd.*

Upon this question Lord Macnaghten, in *Colls* v. *Home and Colonial Stores, Limited*, says[1]: "Perhaps I ought to "add a word about *Warren* v. *Brown*,[2] which is referred to in "both the judgments below. I cannot say that that case is "quite satisfactory to my mind either as dealt with in the "Court of first instance or in the Court of Appeal. In the "Court of first instance the learned judge who tried the case "found a special verdict which is not very easy to understand. "The room in which the light has been materially diminished "'in its present state is,' he says, 'better lighted than the "'ground-floor front rooms in many of the principal streets.' "I do not see what bearing that fact had on the question at "issue."

Anath Nath Deb v. *Galstaun*.

In *Anath Nath Deb* v. *Galstaun*,[3] a recent case in the Calcutta High Court, it was sought to prove that, notwithstanding a material diminution of the plaintiff's light amounting to a nuisance, the plaintiff's office had more light left than many other offices in Calcutta, that the light coming to the

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[1] *Ubi sup.* at p. 194.
[2] (1900) 2 Q. B., 722; C. A. (1902), 1 K. B., 15.
[3] (1908) I. L. R., 35 Cal., 661.

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plaintiff's premises was sufficient for business purposes, and that the plaintiff could, by making internal alterations in his premises, improve the light coming thereto; but it was held, following Lord Macnaghten in *Colls' case*, that such evidence was not relevant.

Kine v. *Jolly*.

And, in this connection, the observations of Vaughan-Williams, L.J., in *Kine* v. *Jolly*,[1] on the meaning and application of the expression "well-lighted," shew that the fact that a particular room is "well-lighted" does not necessarily exclude the existence of a nuisance. He says: "I am not "prepared to say that a room may not be still a well-lighted "room after the obstruction, and yet be a room which is "substantially less comfortable and less convenient according "to the ordinary notions of mankind in this country. I think "that may be so. I do not know what the exact standard is "that one applies when one uses the word 'well-lighted.' "'Well-lighted' is obviously a comparative expression: it may "mean well-lighted taking the average of rooms, or it may "mean well-lighted taking the average of the opinions of "people of the present day as to the quantity of light that is "required. I do not know in which sense it is used here,[2] "but if it means merely that the room is well-lighted taking "the average of rooms of houses in the suburbs, or the average "of rooms in the metropolis or in large towns, it seems to me "that, notwithstanding that the room is well-lighted in that "sense, it still might be that the obstruction has rendered "the house substantially less comfortable and convenient "according to the ordinary notions of mankind."

C.—Form of Injunction. Declaration.

(1) Form of injunction. *Yates* v. *Jack*.

At the time of the decision in *Colls* v. *Home and Colonial Stores, Limited*,[3] the common form of injunction which had been in use since the case of *Yates* v. *Jack*[4] was that which

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[1] (1905) 1 Ch., 480 (494).

[2] In the Court below Kekewich, J., had found that the room in question was, notwithstanding the obstruction, still a well-lighted room.

[3] (1904) App. Cas., 179.

[4] (1866) L. R., 1 Ch. App., 295 (298), referred to in (1904), App. Cas. at p. 207.

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restrained the defendant "from erecting any building so as "to darken, injure, or obstruct any of the ancient lights of the "plaintiff as the same were enjoyed previously to the taking "down of the house which formerly stood on the site of "the defendant's new buildings, and also from permitting to "remain any buildings already erected which will cause any "such obstruction." [1]

Colls v. *Home and Colonial Stores, Ltd.*

But having regard to the decision in *Colls' case* such form cannot now be considered as altogether free from objection in cases arising under the general law—though it may still be suitable in cases governed by the Indian Easements Act [2]—and the order for a perpetual or prohibitory injunction, when expressed in general terms, should now be in the following modified form: "That the defendant, his servants, or agents, "be perpetually restrained from erecting any building so as to "darken, injure, or obstruct any of the plaintiff's ancient "lights or windows so as to cause a nuisance or illegal "obstruction to the plaintiff's ancient lights or windows as the "same existed previously to the taking down of the house "which formerly stood on the site of the defendant's new "buildings." [3]

In cases where before the defendant's new buildings are completed the action is brought to a hearing, but there seems to be good ground for the plaintiff's apprehensions, an order may conveniently be made in the above form with costs up to the hearing, and liberty to the plaintiff within a fixed time after completion to apply for further relief by way of mandatory injunction or damages, as he may be advised.[4]

And a mandatory injunction, if and when granted, should

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[1] *See* the same form adopted in *Dent* v. *Auction Mart Co.*(1866), L. R., 2 Eq., 238 (255).

[2] For forms of orders in cases governed by the Indian Easements Act, *see Kadarbhai* v. *Rahimbhai* (1889), I. L. R., 13 Bom., 674 (677); *Bala* v. *Maharu* (1895), I. L. R., 20 Bom., 788 (791); *Chotalal Mohanlal* v. *Lallabhai Surchand* (1904), I. L. R., 29 Bom., 157.

[3] *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at pp. 193, 194; *Higgins* v. *Betts* (1905), 2 Ch., 210 (217); *Andrews* v. *Waite* (1907), 2 Ch., 500 (510).

[4] *Colls* v. *Home and Colonial Stores, Ltd.* (1904), App. Cas. at p. 194; *Higgins* v. *Betts*, *ubi sup.*

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in form be limited to such parts of the building of the defendant as have been erected so as to cause such nuisance or obstruction as aforesaid.[1]

(2) Declaration.

Where the act or acts complained of is or are to be ascribed rather to a desire on the defendant's part to ascertain the plaintiff's rights than to infringe them (as by the erection of a hoarding), and at the time of the bringing of the action the defendant shews no intention to cause the anticipated disturbance, the Court, instead of granting an injunction, may consider the plaintiff's right to be sufficiently protected by a declaration (with liberty to apply thereafter for an injunction), provided the defendant undertakes to give the plaintiff reasonable notice of his intention to rebuild, and at the same time to produce to the plaintiff upon request his building plans.[2]

(5) *Limitation.*

The sections and articles (second schedule) of the Indian Limitation Act, XV of 1877, applicable to easements have already been referred to and discussed,[3] and attention has been drawn to the effect of the provision contained in the fourth paragraph of section 26 of that Act upon the limitation of suits brought for the disturbance of prescriptive easements.[4]

In order to complete the subject, it is necessary to consider the application of Article 120 to suits for injunctions to restrain the disturbance of easements, and the question of recurring and continuing causes of action.

It must be remembered that Articles 36, 37, and 38 of the second schedule apply only to suits brought to recover *compensation* for the disturbance of easements and natural rights, and that, subject to the apparent effect of the above-mentioned provision in section 26, there is no express provision in the Act as to the period of limitation of suits brought to *restrain* the disturbance of easements or natural rights.

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[1] *See* the form of the order in *Higgins* v. *Betts*, and *Andrews* v. *Waite*, *ubi sup.*

[2] *Smith* v. *Baxter* (1900), 2 Ch., 138 (148).

[3] *See* Chap. I, Part II, E, at p. 45.

[4] *See* Chap. VII, Part II, at pp. 455 *et seq.*

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Limitation Act, XV of 1877, Second Schedule, Art. 120.

Thus, the Court has had no alternative but to hold that the limitation of such last-mentioned suits is governed by Article 120, which prescribes a six years' limitation.[1]

Recurring cause of action. Rights of support.

As to recurring causes of action, it should be remembered that in the case both of easements and natural rights of support each successive subsidence causing a recurrence of damage constitutes a fresh cause of action.[2]

Continuing cause of action. Rights in water. Ancient lights.

In respect of obstructions or disturbances which are continuing acts, the cause of action accrues *de die in diem*.[3]

Within this category fall obstructions to rights in water,[4] and obstructions to ancient lights.[5]

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[1] *Kanakasabai* v. *Mutta* (1890), I. L. R., 13 Mad., 445.

[2] *Mitchell* v. *Darley Main Colliery Co.* (1886), 11 App. Cas., 127; *Crumbie* v. *Wallsend Local Board* (1891), 1 Q. B., 503; *West Leigh Colliery Co.* v. *Tunnicliffe & Hampson, Ltd.* (1908), App. Cas., 27; and *see* Chap. III, Part IV, and Chap. V, Part IV.

[3] *See* s. 23 of Act XV of 1877, App. IV, and the cases below cited.

[4] *Ponnusammi Tevar* v. *Collector of Madura* (1869), 5 Mad., H. C., 6 (24); *Rajroop Koer* v. *Syed Abul Hossein* (1880), I. L. R., 6 Cal., 394; 7 Cal. L. R., 529; 7 Ind. App., 240; *Punja Kunverji* v. *Bai Kuvar* (1881), I. L. R., 6 Bom., 20.

[5] *Thompson* v. *Gibson* (1841), 7 M. & W. at p. 460; *Jenks* v. *Phasant Clydes* (1887), 1 Ch., 694.

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CHAPTER XII.

Licenses.

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Mere license defined.

It will be remembered that a mere license is a purely personal privilege or right enabling the licensee to do something on the land of the licensor which would otherwise be unlawful.[1]

Nature and legal incidents. *Muskett* v. *Hill*. *Wood* v. *Leadbitter*.

In *Muskett* v. *Hill*[2] and *Wood* v. *Leadbitter*[3] the nature and legal incidents of a license were considered and explained, and the elaborate judgment of Chief Justice Vaughan in the old case of *Thomas* v. *Sorrell*[4] was quoted with approval. In *Wood* v. *Leadbitter*, Baron Alderson, in delivering the judgment of the Court, said[5]—

"In the course of his judgment[6] the Chief Justice says,
"'A dispensation or license properly passeth no interest, nor
"'alters or transfers property in anything, but only makes an
"'action lawful, which without it had been unlawful. As a
"'license to go beyond the seas, to hunt in a man's park, to
"'come into his house, are only actions which, without
"'license, had been unlawful. But a license to hunt in
"'a man's park, and carry away the deer killed to his own
"'use; to cut down a tree in a man's ground, and to carry
"'it away the next day after to his own use, are licenses
"'as to the acts of hunting and cutting down the tree,
"'but as to the carrying away of the deer killed and tree
"'cut down, they are grants. So, to license a man to eat
"'my meat, or to fire the wood in my chimney to warm
"'him by, as to the actions of *eating*, firing my wood, and
"'warming him, they are licenses; but it is consequent
"'necessarily to those actions that my property may be
"'destroyed in the meat eaten, and the wood burnt. So as
"'in some cases, by consequent and not directly, and as
"'its effect, a dispensation or license may destroy and alter
"'property.'"

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[1] *See* Chapter I, Part I, pp. 27 *et seq.* A license may also refer to something to be done on the land of the licensee, as in the case of the extinction of an easement through the authorised act of the servient owner, *see supra*, Chap. IX, Part II, B, pp. 532 *et seq.*, and *infra* in connection with the question as to when a mere license may become irrevocable.

[2] (1839) 5 Bing. N. C., 694.

[3] (1845), 13 M. & W., 838.

[4] (1679), Vaughan's Rep., 344 (351).

[5] *Ubi sup.* at p. 844.

[6] *i.e.* in *Thomas* v. *Sorrell*, *ubi sup.*

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This definition of license has also been quoted with approval in later cases, such as *Newby* v. *Harrison*[1] and *Heap* v. *Hartley*,[2] and in the last-mentioned case stress was laid on the point that a license pure and simple is merely leave to do a thing, enabling the licensee to do lawfully what he could not otherwise do except unlawfully, that it confers no interest or property in the thing, and that, though it may be coupled with a grant which conveys an interest in property, by itself it never conveys an interest in property. *Newby* v. *Harrison*. *Heap* v. *Hartley*.

In India, judicial and legislative definitions of license have evidently followed the English definitions of the term.[3] English definitions followed in India.

Section 52 of the Indian Easements Act enacts that where one person grants to another, or to a definite number of persons, a right to do or to continue to do, in or upon the immoveable property of the grantor, something which would in the absence of such right be unlawful, and such right does not amount to an easement or interest in property, the right is called a license.

The other two distinctive features of a mere license are that it is revocable,[4] and that, being a purely personal right, it cannot be assigned.[5]

Keeping in view the nature and incidents of a license as above defined, it will be observed that the essential points of difference between a mere license and an easement including a *profit à prendre* are that a license by itself is a mere personal right to do on the land of the grantor something which without such license would be unlawful, it is not a right appurtenant, it cannot be assigned, and it is revocable, whereas an easement is a right appurtenant, and a right *in rem*, and so long as it continues, the benefit and burthen of it continue also and are enforceable by all and against all into whose hands the dominant and servient tenements respectively come.[6] Essential points of difference between a mere license and an easement.

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[1] (1861) 1 J. & H., 393.

[2] (1889) 42 Ch. D., 461.

[3] *Krishna* v. *Rayappa* (1868), 4 Mad., H. C., 98; I. E. Act, s. 52; *see* App. VII for the text of this section.

[4] *See infra.*

[5] *See infra.*

[6] *Thomas* v. *Sorrell* (1679), Vaughan's Rep., 344; *Muskett* v. *Hill* (1839), 5 Bing. N. C., 694; *Wickham* v. *Hawker*

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Cases of construction as to nature of particular grant.

With these general observations on the nature and legal incidents of a license, it is proposed now to consider the principal authorities in which questions have been raised and decided as to the nature of the particular grant; as to whether it was an easement that had been granted, or a *profit à prendre*, or a license coupled with an interest in immoveable property, or the immoveable property itself, or a license for profit, or an ordinary license, that is, a mere license for pleasure.

It is hoped that this treatment of the subject will serve to accentuate the essential points of difference between the merely personal right, revocable and unassignable, and the higher rights above enumerated.

Webb v. *Paternoster*.

The first case to which it is necessary to refer is that of *Webb* v. *Paternoster*.[1]

License coupled with an interest.

That was an action of trespass brought against the defendant for eating, by the mouths of his cattle, the plaintiff's hay. The defendant justified under the owner of the fee of the close in which the hay was, averring that such owner had leased the close to him, and therefore, as lessee, he turned his cattle into the close, and they ate the hay. The plaintiff replied that, before the making of the lease, the owner of the fee had licensed him to place the hay on the close until he could conveniently sell it, and that, before he could conveniently sell it, the owner of the fee had leased the land to the defendants.

The decision ultimately went on the ground that the plaintiff had had more than reasonable time to sell the hay, and the view subsequently taken of the case by the Court of Exchequer in *Wood* v. *Leadbitter*[2] shews that if, as was very

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(1840), 7 M. & W., 63; *Wood* v. *Leadbitter* (1845), 13 M. & W., 838; *Hill* v. *Tupper* (1863), 2 H. & C., 121; 32 L. J. Exch., 217; *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98; *Prosonna Coomar Singha* v. *Ram Coomar Ghose* (1889), I. L. R., 16 Cal., 640; *Heap* v. *Hartley* (1889), 42 Ch. D., 461; *Ramakrishna* v. *Unni Check* (1892), I. L. R., 16 Mad., 280; *Vishnu* v. *Rango Ganesh Purandare* (1893), I. L. R., 18 Bom., 382; *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397.

[1] (1620), 2 Roll. Rep., 143; Poph., 151; Palmer, 71. And *see* this case considered at length in *Wood* v. *Leadbitter*, *ubi sup.* at pp. 846-848.

[2] *Ubi sup.*

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probable, the plaintiff had purchased the hay from the owner of the fee as a growing crop, with liberty to stock it on the land, the license would not have been a mere license for pleasure but a license coupled with an interest.

In *Wood* v. *Lake*[1] the defendant had, by parol agreement, given liberty to the plaintiff to stock coals on the defendant's land for a term of seven years. When the plaintiff had enjoyed the liberty for seven years the defendant locked up the gate of the close. *Wood* v. *Lake*. License and not lease.

The defendant contended that the agreement amounted to a lease which was void after three years under the Statute of Frauds for not being in writing. Judgment, however, was given for the plaintiff, it being decided that the agreement was one of license and not of lease, since if a man licenses to enjoy lands for five years, that is a lease, because the whole interest passes; but this was only a license for a particular purpose.

In *Tayler* v. *Waters*[2] a right conferred by ticket to enter and remain in a theatre during a performance was considered not to be an interest in land but a license to permit the enjoyment of certain privileges thereon. *Tayler* v. *Waters*. License.

The case of *Doe dem Hanley* v. *Wood*[3] shews that the grant of a free liberty to dig, work, mine, and search for tin and all other metals throughout certain lands for a particular term, does not amount to a demise of the metals and minerals, nor convey the legal estate in them during the term as a chattel real, so as to entitle the grantee to maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee, and is nothing more than a mere license to search and get, coupled with a grant of such of the ore as should be found or got. *Doe d. Hanley* v. *Wood*. License coupled with a grant, not lease.

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[1] (1751) Sayer., 3, and *see* a copy of the report in *Wood* v. *Leadbitter*, *ubi sup.*, at p. 848.

[2] (1817) 7 Taunt., 374; 18 R. R., 499.

[3] (1819) 2 B. & Ald., 724; 21 R. R., 469; *see* this case referred to and explained in *Muskett* v. *Hill* (1839), 5 Bing., N. C., 694; *Ramakrishna* v. *Unni Check* (1892), I. L. R., 16 Mad., 280; *Sundrabai* v. *Jayawant* (1898), I. L. R., 20 Bom., 397, and *see infra* the view taken in *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch., 483, that the liberty to work mines is a *profit à prendre*.

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Wood v. *Manley*.

License coupled with an interest.

In *Wood* v. *Manley*[1] the defendant had purchased a large quantity of hay stored on the plaintiff's land on the condition agreed to by the plaintiff that he should have until a particular date to remove it. Before such date the plaintiff locked up the close and the defendant broke open the gate in order to remove the hay. A verdict in the defendant's favour on the direction that the license was irrevocable was upheld by the Court of Queen's Bench, and this decision was approved by the Court in *Wood* v. *Leadbitter*[2] on the ground that the license in question was not a mere license, but a license coupled with an interest, like the case of the tree and the deer put by Vaughan, C.J., in *Thomas* v. *Sorrell*.[3]

Muskett v. *Hill*.

License coupled with a grant.

In *Muskett* v. *Hill*[4] the indenture of grant was substantially in the same terms as that in *Doe dem Hanley* v. *Wood* above-cited, and was considered to operate not as a mere license, but as a license carrying an interest, or, as it is called, a license coupled with a grant.

Wickham v. *Hawker*.

License of profits, or *profit à prendre*.

In *Wickham* v. *Hawker*,[5] certain lands were conveyed to the grantee and his heirs, *excepting and reserving* to the grantors and another, their heirs and assigns, free liberty, with servants or otherwise, to come into and upon the lands and there to hawk, hunt, fish, and fowl. It was held that in point of law this was not a *reservation*[6] but a *new grant* by the grantee (who executed the deed) so as to enure to the benefit of the other, who was not a party to the deed, and his heirs, and further, was a grant of a *license of profit*, and not a mere *personal license of pleasure*.[7]

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[1] (1839) 11 Ad. & E., 34; 3 Per. & D., 5.

[2] *Ubi sup.* at p. 853.

[3] *See supra*.

[4] (1839) 5 Bing. N. C., 694.

[5] (1840) 7 M. & W., 63. *See* also *infra*, *Webber* v. *Lee* (1882), 9 Q. B. D., 315; *Fitzgerald* v. *Firbank* (1897), 2 Ch., 96.

[6] As to such a liberty or any easement being, in strictness, incapable either of exception or reservation, *see* further, *Doe d. Douglas* v. *Lock* (1835), 2 Ad., 705 (743); *Durham and Sunderland Ry. Co.* v. *Walker* (1842), 2 Q. B., 940 (967); 57 R. R., 842 (861); cited in *Hay* v. *Belleville* (1905), 2 Ch. at p. 609.

[7] In this case Parke, B., who delivered the judgment of the Court, thought that liberties of fowling, hawking, and fishing were clearly *profits à prendre* but questioned whether a liberty of hunting was so too, as not of itself importing the right to the animal when taken, and, when given to one individual either on

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The well-known case of *Wood* v. *Leadbitter*[1] has decided that the privilege of entering a race-stand, or enclosure attached to it, to which admission is allowed by ticket for which a valuable consideration has been paid is nothing more than a mere license, and is revocable at any time.[2]

Wood v. *Leadbitter*. License.

In *Newby* v. *Harrison*[3] it was said by Page-Wood, V.C., following the definition of license in *Muskett* v. *Hill*,[4] that a license to enter upon a canal and take away the ice, is a mere license; and that the right of carrying it away is a grant of the ice so to be carried away, which is the property of the licensor. Thus, this was clearly the case of a license coupled with a grant.

Newby v. *Harrison*. License coupled with a grant.

In *Hill* v. *Tupper*[5] there was a grant by deed to the plaintiff of the sole and exclusive right or liberty to put or use pleasure boats for hire on a canal, and it was decided that this grant operated merely as a license or covenant, on the part of the grantors, and was binding on them only as between themselves and the grantee.[6]

Hill v. *Tupper*. License.

In *Russell* v. *Harford*[7] two persons occupied adjoining premises as tenants of the same landlord, and from a well on one tenant's premises the other tenant's premises were supplied with water by means of a pipe. Both premises were

Russell v. *Harford*. License.

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one occasion or for a time, or for his life, as amounting only to a mere personal license of pleasure to be exercised by the individual licensee. But where, as in this case, the liberty is granted by deed to persons, "their heirs *and assigns*," an intention is thereby clearly manifested to grant not a mere license limited to the particular person named, but an interest or *profit à prendre*, exercisable by the licensees, their heirs, or assigns, or servants, *see* also *Webber* v. *Lee* (1882), 9 Q. B. D., 315 (318), and further *infra*.

[1] (1845) 13 M. & W., 838.

[2] *See* this case fully considered *infra* in connection with the revocability of licenses, pp. 669 *et seq.*

[3] (1861) 1 J. & H., 393; affirmed on appeal, 4 L. T., 424; s.c. in 30 L. J. Ch., 863, as to jurisdiction of Court to order assessment of damages after dismissal of bill in respect of interim injunctions granted against defendants.

[4] *Ubi sup.*

[5] (1863) 2 H. & C., 121; 32 L. J. Exch., 217; 8 L. T., 792.

[6] That part of the license referring to letting out the boats on hire may be called a "license for profit"—a term applied to licenses which result in profit in some form or another to the licensee. For similar licenses, *see supra*, *Webb* v. *Paternoster*; *Wood* v. *Manley*. And *see infra* in connection with the subject of revocability, pp. 669 *et seq.*

[7] (1866) L. R., 2 Eq., 507; 15 L. T., 171.

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put up to sale subject to all rights of way and water and other easements (if any) subsisting thereon, and both tenants purchased the premises severally occupied by them. In an action by the tenant purchaser of the premises from which the water was supplied for specific performance of the contract for sale without any reservation of the right of the tenant purchaser of the adjoining premises to the use of the water, it was held that the right of water was not an easement which could be enforced against a purchaser, but simply a license from the landlord to the tenant to have a supply of water from the adjoining premises so long as the tenancy lasted, and that the plaintiff was entitled to the relief asked.

Kesava Pillai v. *Peddu Reddi*.

License.

In *Kesava Pillai* v. *Peddu Reddi*[1] a tenant with the permission of his landlord erected a dam upon his holding whereby he obstructed the natural flow of water to other lands belonging to his landlord. It was held that this right did not amount to a grant, but was a mere license.

Krishna v. *Rayappa Shanbhaga*.

Easement.

In *Krishna* v. *Rayappa Shanbhaga*[2] the plaintiff and defendant had by parol agreement constructed a dam across a main channel, and from thence a smaller channel was made through the land of the defendant to the lands of the plaintiff, through which it was agreed that the plaintiff should be at liberty to bring water for the irrigation of his fields. This agreement had been executed and acted on for many years. It was held that this agreement created not merely a parol license revocable at the will of the defendant, but a valid easement in respect of the plaintiff's tenement over the defendant's tenement.

Webber v. *Lee*.

Profit à prendre.

In *Webber* v. *Lee*[3] it was decided, in accordance with the principle laid down in *Wickham* v. *Hawker*,[4] that the right to shoot game and take it away when shot is an interest in land and a *profit à prendre*.

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[1] (1863) 1 Mad. H. C., 258.
[2] (1868) 4 Mad. H. C., 98.
[3] (1882) 9 Q. B. D., 315.
[4] *See supra*.

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In *Prosonna Coomar Singha* v. *Ram Coomar Ghose*[1] the Calcutta High Court, on the authority of *Wood* v. *Leadbitter*,[2] allowed a special appeal on the ground that an agreement between the plaintiff and defendant that the former should have the use of a plot of land belonging to the latter as a privy was a mere license revocable at the will of the defendant, subject to the right of the other to damages if the license were revoked contrary to the terms of any express or implied contract.

Prosonna Coomar Singha v. *Ram Coomar Ghose*.

License.

In *Duke of Sutherland* v. *Heathcote*[3] it is pointed out that a right to work mines is something more than a mere license; that it is a *profit à prendre*, an incorporeal hereditament lying in grant.

Duke of Sutherland v. *Heathcote*.

Profit à prendre.

In *Ramakrishna* v. *Unni Check*[4] it was held by the Madras High Court, with special reference to the definitions of "easement" and "license" contained in sections 4 and 52 respectively of the Indian Easements Act, that a permission to capture and remove fifty elephants given by the owner of a forest in consideration of a certain payment in respect of each elephant captured, was a mere license and unassignable.

Ramakrishna v. *Unni Check*

License.

Having regard to the *dicta* in *Thomas* v. *Sorrell*, *Wickham* v. *Hawker*, *Wood* v. *Leadbitter*, and other cases above cited, it is questionable whether outside the Indian Easements Act and under the general law, this decision could be supported, since though the liberty to enter the forest is only a mere license, the permission to capture and remove the elephants is certainly a grant of those animals causing the agreement to operate as a license coupled with a grant or as a *profit à prendre*.

In *Vishnu* v. *Rango Ganesh Purandare*[5] the deed whereby a part of certain premises was mortgaged gave the mortgagee the use of a privy in another part of the same premises and a right of way to it through a certain passage.

Vishnu v. *Rango Ganesh Purandare*.

Easement.

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[1] (1889) I. L. R., 16 Cal., 640.
[2] *See supra*.
[3] (1892) 1 Ch., 475 (483).
[4] (1892) I. L. R., 16 Mad., 280.
[5] (1893) I. L. R., 18 Bom., 382.

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It was contended on the authority of *Wood* v. *Leadbitter* and *Prosonna Coomar Singha* v. *Ram Coomar Ghose* above cited, that the use of the privy and the passage was not an easement, but a mere license conferred by the mortgage; but it was held that the privilege having been granted by the mortgage deed itself must be regarded by the very terms of the grant as a privilege ancillary to the use of the house, and, therefore, an easement.

Aldin v. *Latimer Clark, Muirhead & Co.*

License.

In *Aldin* v. *Latimer Clark, Muirhead & Company*[1] permission was given by the lessor to the lessee, after date of lease, to construct at his own cost certain ventilators in the wall of a building demised by the lease. The lessee gave no consideration for such permission and no deed was executed giving him the right to use the ventilators. This was held to be a revocable license.[2]

Fitzgerald v. *Firbank*.

Profit à prendre.

In *Fitzgerald* v. *Firbank*,[3] there was a grant to the plaintiff of "the exclusive right of fishing" for a certain term in a certain river with a proviso that "the right of fishing hereby "granted shall only extend to fair rod and line angling at "proper seasons, and to netting for the sole purpose of "procuring fish-baits."

It was held that this was not a mere revocable license but a *profit à prendre* and an incorporeal hereditament conferring on the grantee such possessory rights that he had a right of action against any one who infringed them.[4]

In the course of his judgment in the Court of Appeal Lindley, L.J., said: "The right of fishing includes the right "to take away fish unless the contrary is expressly stipulated. "I have not the slightest doubt about that. Therefore the "plaintiffs have a right as distinguished from a mere revocable "license. What kind of a right is it? It is more than an "easement: it is what is commonly called a profit à prendre,

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[1] (1894) 2 Ch., 437, 447, 448.

[2] By reason of the obstruction of the ventilators by the lessor's assigns without notice to the licensee, the latter was held entitled to an inquiry as to damages. *See* further in this connection *infra*, p. 578.

[3] (1897) 2 Ch., 96.

[4] *See* also *Lowe* v. *Adams* (1901), 2 Ch., 598.

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"and it is of such a nature that a person who enjoys that "right has such possessory rights that he can bring an action "for trespass at common law for the infringement of those "rights. The law on this subject was very carefully con- "sidered, and will be found laid down in *Holford* v. *Bailey*[1] in "the Exchequer Chamber. Again, if he has a possessory "right, and if not a grantee by deed but only claiming under "an agreement, he can be said to have the use and occupation "of the right. That was decided in the case of *Holford* v. "*Pritchard*.[2] The plaintiffs' rights are, therefore, pretty "accurately defined."

Sundrabai v. *Jayawant*.

Easement in nature of *profit à prendre*.

In *Sundrabai* v. *Jayawant*[3] the plaintiff and his predecessors in title had enjoyed from time immemorial the use of land, which at date of action was vested in the defendant as mortgagee, for the purpose of growing on it young rice plants which were afterwards to be transplanted to their own land. This right, which originated in prescription, was afterwards confirmed by a grant from the mortgagor, who agreed to pay compensation in case of obstruction.

The covenant as to compensation, the use of the word *nirantar* in the grant without further specification, and the absence of all mention of the land owned by the plaintiff in which the transplantation was to take place, were all relied on by the defendant as shewing that the grant was a license not binding on the defendant as the mortgagee of the person giving it, and not an easement or lease of lands.

It was held that the right was appurtenant to the plaintiff's land, and fell within the definition of "easement" contained in section 4 of the Indian Easements Act, and was therefore an easement in the nature of a *profit à prendre* appurtenant to land, and not a mere license which has no connection with the ownership of property, but creates only a personal right neither assignable by the licensee, nor binding on the

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[1] (1850) 13 Q. B., 426.
[2] (1849) 3 Exch., 793.
[3] (1898) I. L. R., 23 Bom., 397.

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assignee of the licensor. With reference to section 52 of the Indian Easements Act, it was said that the negative definition of a license therein contained makes it necessary that, before a right can be shewn to be a license only, it must be proved not to be an easement, or an interest in property.[1]

Wilson v. *Tavener*.

In *Wilson* v. *Tavener*,[2] by an agreement in writing, the defendant agreed to let the plaintiff erect a hoarding for the

License.

purpose of a bill-posting and advertising station upon the fore-court of a cottage, and to permit him to use the gable end of another cottage for the same purpose at a yearly rent payable on the four usual quarter-days.

It was held that this was not a demise or lease but a mere license revocable at will on reasonable notice.

Lowe v. *Adams*.

In *Lowe* v. *Adams*[3] it was held that the grant of a right to shoot pheasants enjoyed from year to year at an annual pay-

Profit à prendre.

ment was more than a mere license; that it gave a right to shoot and carry away the game when shot, and it was not revocable at will.

When grant by deed, nature of grant must depend on construction of deed.

It is to be observed that where a license has been created by deed, the question whether the right is a mere license or a license coupled with a grant of immoveable property or of an interest in immoveable property, must depend for its determination upon the construction of the terms of the grant.[4]

An "exclusive license" in no way differs in its incidents from an ordinary license, though in its nature it does so to the extent that its name imports.[5]

Its true nature has been explained to be "a leave to do a "thing, and a contract not to give leave to anybody else to do "the same thing."[6]

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[1] *Ibid.* at p. 400.

[2] (1901) 1 Ch., 578.

[3] (1901) 2 Ch., 598.

[4] *Doe dem Hanley* v. *Wood* (1819), 2 B. & Ald., 724; 21 R. R., 469; *Muskett* v. *Hill* (1839), 5 Bing. N. C., 694; *Wood* v. *Leadbitter* (1845), 13 M. & W., 838 (845); *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch., 475 (485).

[5] *Heap* v. *Hartley* (1889), 42 Ch. D., 461.

[6] *Ibid.*, per Fry, L.J., at p. 470.

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"Exclusive license:" Its nature and incidents.

Thus, it has been held that an exclusive license to use a certain invention for a certain time, within a certain district, does not amount to a grant of the patent right so as to enable the licensee to sue in his own name for an alleged infringement of the right.[1]

Where the license is exclusive, any violation of the contract not to give anybody else leave to do the same thing would of course give the licensee a right of action against the licensor.[2]

Exclusive license must be clearly granted.

But though an exclusive license or an exclusive right to all the profits of a particular kind can be granted, such a right is only to be inferred from language that is clear and explicit.[3]

Where a canal company in consideration of the expense the lessees had incurred in the erection of buildings for storing ice upon the demised premises, and of the rents and covenants reserved by, and contained in, the lease, demised certain pieces of land on the banks of a canal together with liberty to take ice from the said canal within a certain distance, it was held that such a license was not exclusive so as to entitle the lessee to all the ice, but amounted merely to a grant of sufficient ice to enable the lessee to fill the ice-houses, and that, so long as this right was not interfered with, the lessee had no ground of complaint.[4]

So it has been frequently held that, in the absence of clear and explicit language conferring an exclusive right, the grant of a liberty to work mines is not the grant of an exclusive right to work them, even if the grant is in terms without any interruption by the grantor.[5]

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[1] *Ibid.* And *see* this question further considered in connection with the obstruction of licenses, *infra*, pp. 679, 680.

[2] *Heap* v. *Hartley* (1889), 42 Ch. D., 461 (469).

[3] *See Duke of Sutherland* v. *Heathcote* (1892), 1 Ch. at p. 485, and the cases there cited.

[4] *Newby* v. *Harrison* (1861), 1 J. & H., 393; 4 L. T., 424.

[5] *Lord Mountjoy's case*, 1 And., 307; 4 Leon, 147; *Chetham* v. *Williamson* (1804), 4 East., 469; *Doe dem Hanley* v. *Wood* (1819), 2 B. & Ald., 724; 21 R. R., 469; *Carr* v. *Benson* (1868), L. R., 3 Ch. App., 524; *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch., 475.

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By whom license may be granted.

A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interest in the property affected by the license.[1]

Thus, just as one of two or more co-tenants may lawfully enjoy the whole of the demised property in any way not destructive of the substance so as to amount to an ouster of the other co-tenant or co-tenants, so may such co-tenant license another person to do what he may do himself.[2]

And a mortgagee, in possession, of one of the co-tenants has the same power to grant a license.[3]

Upon this principle it has been held that the co-tenant of a forest or his mortgagee in possession may lawfully license another person to cut wood in the forest, and that in equity the rights of the co-tenants *inter se* would be to an account of the profits realised, and a distribution of them according to their proportions of ownership.[4]

Grant of license may be express or implied.

The grant of a license may be express, or implied from the conduct of the grantor.[5]

Express grant.

In India, as in England, the express grant of a mere license need not be in writing.[6]

But where in India a license is coupled with a grant of immoveable property or an interest in immoveable property, such a grant must be in writing and registered if it falls within the provisions of the Transfer of Property Act[7] and the Registration Act[8] requiring such writing and registration.

It is obvious that the grant must exist independently of the license, unless it is a grant capable of being made by parol, or by the instrument giving the license.[9]

Where writing and registration are compulsory, a grant, if unwritten and unregistered, would be void and the license would remain a mere license.[10]

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[1] I. E. Act, s. 53, *see* App. VII.

[2] *Balvantrav Oze* v. *Gandpatrav Jadhav* (1883), I. L. R., 7 Bom., 336.

[3] *Ibid.*

[4] *Ibid.*

[5] I. E. Act, s. 54, *see* App. VII.

[6] *Krishna* v. *Rayappa* (1868), 4 Mad. H. C. 98; *Wood* v. *Leadbitter* (1845), 13 M. & W., 838, 845, 852.

[7] Ss. 54, 59, 107, and 123.

[8] S. 17.

[9] *Wood* v. *Leadbitter*, *ubi sup.* at p. 852.

[10] *Wood* v. *Leadbitter*, *ubi sup.* at p. 845; *Hewitt* v. *Isham* (1851), 21 L.

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Thus, where there was a grant of a parol license to make, at the cost of the licensee, a drain from the licensor's land into the licensee's, and the licensee having accordingly made such drain at his own expense, the licensor obstructed it, it was held that an action for the obstruction could not be maintained, because an incorporeal right affecting land could not be created without a deed.[1]

Implied grant. Two classes of cases.

A license may be implied from the conduct of the licensor where by acquiescence or encouragement he allows something to be done on his own land by another person who believes the land to be his own.[2]

Ramsden v. *Dyson*.

The equitable principle is clearly stated in *Ramsden* v. *Dyson*[3] by Lord Chancellor Cranworth in the following words :—

"If a stranger begins to build on any land supposing it "to be his own, and I, perceiving his mistake, abstain from "setting him right, and leave him to persevere in his error, a "Court of Equity will not allow me afterwards to assert my "title to the land on which he had expended money on the "supposition that the land was his own. It considers that, "when I saw the mistake into which he had fallen, it was my "duty to be active and to state my adverse title; and that it "would be dishonest in me to remain wilfully passive on such "an occasion, in order afterwards to profit by the mistake "which I might have prevented."

"But, it will be observed that to raise such an equity two "things are required, first, that the person expending the "money supposes himself to be building on his own land; "and, secondly, that the real owner at the time of the expendi- "ture knows that the land belongs to him and not to the

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J. N. S. Exch., 35; I. E. Act, s. 54, M. & R., 418, and recognised in *Wood* v. *Leadbitter* (1845), 13 M. & W., 838; *see* also *Aldin* v. *Latimer Clark, Muirhead & Co.* (1894), 2 Ch., 437 (448).

[2] *Rochdale Canal Co.* v. *King* (1851), 2 Sim. N. S., 78 (88); *Ramsden* v. *Dyson* (1866), L. R., 1 H. L., 129.

[3] *Ubi sup.* at p. 140.

see App. VII. But *see* the equitable exception in the case of entry and payment of rent under a void lease or agreement, *infra*, p. 674.

[1] *Hewlins* v. *Shippam* (1826), 5 B. & C., 221; 31 R. R., 757. *See* the same doctrine acted on in *Cocker* v. *Cowper* (1834), 1 C.

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"person expending the money in the belief that he is the "owner. For if a stranger builds on my land knowing it to be "mine, there is no principle of equity which would prevent "my claiming the land with the benefit of all the expenditure "made on it. There would be nothing in my conduct, active "or passive, making it inequitable in me to assert my legal "rights."

"It follows as a corollary from these rules, or, perhaps, it "would be more accurate to say it forms part of them, that, if "my tenant builds on land which he holds under me, he does "not thereby, in the absence of special circumstances, acquire "any right to prevent me from taking possession of the land "and buildings when the tenancy has determined. He knew "the extent of his interest and it was his folly to expend "money upon a title which he knew would or might soon come "to an end."

Another illustration of an implied license may be found in cases where the licensor acquiesces in the licensee's doing something on the latter's land whereby an incorporeal right or easement enjoyed by the former over such land is restricted or extinguished.[1]

Accessory license.

Accessory licenses are licenses which are given by law as being necessary to the enjoyment of any interest or to the exercise of any right.[2]

Richard Liford's case.

Thus it was resolved in *Richard Liford's case*[3] that when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him, and them who would buy, power, as incident to the exception, to enter and shew trees to those who would have them; for without sight none would buy, and without entry they could not see them.

And in the same case it was said[4]: "If I grant you trees

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[1] *See supra* Chap. IX, Part II, B, p. 533, and *infra* in connection with the question as to when a mere license may become irrevocable, pp. 674, 675.

[2] I. E. Act, s. 55, *see* App. VII. For the general law, see *Richard Liford's case* (1615), 11 Rep. 46*b*; *Dennett* v. *Grover* (1739), Willes, 195; *Hewitt* v. *Isham* (1851), 21 L. J. N. S., Exch., 35.

[3] *Ubi sup.* at p. 52*a*.

[4] *Ibid.*

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"in my wood, you may come with carts over my land to carry "the wood, temp. Ed. I."

It is presumed that accessory licenses like accessory easements can be allowed only on the ground of being necessary to the enjoyment of the interest or to the exercise of the right in respect of which they are claimed.[1]

A mere license, that is, a license for pleasure, being founded in personal confidence, can neither be assigned by the licensee, nor exercised by his servants or agents.[2]

Mere license not assignable nor exercisable by licensee's servants or agents.

In this respect it differs from a license coupled with a grant of immoveable property or of an interest in immoveable property[3] such as a *profit à prendre*, either of which is assignable and can be exercised by the licensee's servants or agents.

Distinction between mere license and license coupled with a grant.

This distinction was clearly pointed out in the cases of *Muskett* v. *Hill*[4] and *Wickham* v. *Hawker*.[5]

Muskett v. *Hill*.

Wickham v. *Hawker*.

The first of these two cases was, as already seen, that of a license to search for and get minerals coupled with a grant of the minerals when found or got.

The second, it will be remembered, was the case of a license of "hawking, hunting, fishing and fowling."

These cases shew that a mere license of pleasure can neither be assigned by the licensee nor exercised by his servants or agents when unaccompanied by words shewing that a larger grant is intended (as by the use of the word "assigns" or the express mention of "servants"), but a *profit à prendre* or a license coupled with a grant of immoveable property is of itself assignable and can be exercised by the licensee's servants or agents.[6]

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[1] *See supra* Chap. VIII, Part II, p. 516.

[2] 3 Kent's Comm., 583; *Muskett* v. *Hill* (1839), 5 Bing. N. C., 694; *Wickham* v. *Hawker* (1840), 7 M. & W., 63; *Ramakrishna* v. *Unni Check* (1892), I. L. R., 16 Mad., 280; *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397; I. E. Act, latter part of s. 56, *see* App. VII.

[3] *Muskett* v. *Hill*; *Wickham* v. *Hawker*, *ubi sup.*; *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98.

[4] *Ubi sup.*

[5] *Ubi sup.*

[6] *Cf.* ss. 4 and 52 of the I. E. Act (App. VII) and *Ramakrishna* v. *Unni Check* (1892), I. L. R., 16 Mad., 280, where it was held that a license for consideration to capture and remove fifty wild elephants was a mere license and unassignable, and *see* the comments on this case, *supra*, p. 659.

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I. E. Act, s. 56.

Section 56 of the Indian Easements Act apparently creates an exception to the general rule by providing that unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee.[1]

Duties of licensor. I. E. Act, s. 57.

By section 57 of the Indian Easements Act a licensor is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the licensor is, and the licensee is not, aware.[2]

I. E. Act, s. 58.

By section 58 of the same Act a licensor is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.[3]

Under the English law the liability of the licensor for injury sustained by the licensee in the exercise of the license depends upon some wrongful act or breach of positive duty. Something like fraud must be shewn.

There must be wilful deception, or the doing of some act which may place the licensee in danger.[4]

Thus, if the licensor places an obstruction on his land which is likely to cause injury to the licensee, he may be responsible[5]; and he will be liable for the consequences of any wrongful act, such as deliberately laying a pitfall for the licensee or misrepresenting the condition of his property; but he will not be responsible for injury caused to the licensee merely by reason of his allowing a way to remain out of repair and omitting to warn the licensee of its condition.[6]

Effect of alienation of property affected by license.

When the licensor conveys away the property affected by a mere license, he ceases to be bound by the license; nor is the assignee as such bound by it, and the assignment operates as an implied revocation of the easement.[7]

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[1] For the text of the section, *see* App. VII, and for the general law, *see supra*, pp. 653, 667.

[2] *See* App. VII.

[3] *See* App. VII.

[4] *Gautret* v. *Egerton* (1867), L. R., 2 C. P., 371.

[5] *Ibid.* at p. 375; and *see Corby* v. *Hill* (1858), 4 C. B. N. S., 556; 27 L. J. C. P., 318.

[6] *Gautret* v. *Egerton*, *ubi sup.*

[7] *Wallis* v. *Harrison* (1838), 4 M. & W., 538; *Roffey* v. *Henderson* (1851), 17 Q. B., 574; *Coleman* v. *Foster* (1856),

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This rule further demonstrates the strictly personal character of the privilege.

In *Wallis* v. *Harrison*, Lord Abinger, C.B., said[1]: "A mere parol license to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. I never heard it supposed that if a man out of kindness to a neighbour allows him to pass over his land, the transferee of that land is bound to do so likewise." *Wallis* v. *Harrison*.

Nor is the licensee entitled to have notice of the transfer, for a person is bound to know who is the owner of the land upon which he does that which, *primâ facie*, is a trespass.[2]

Here, again, must be noted the distinction between a mere license and a license coupled with the creation of an interest in immoveable property, for whilst the former by reason of its personal character is not binding on the transferee of the property affected by it, the latter follows the land when transferred, and is as binding on the transferee as it was on the transferor.[3]

Mere license revocable. License coupled with grant irrevocable.

A mere license is revocable, but when it is coupled with a grant of immoveable property or of an interest in immoveable property, then the grantor cannot in general revoke it so as to defeat the grant to which it was incident.[4]

Further, a license under seal (provided it be a *mere license*) is as revocable as a license by parol; but a license by parol, when coupled with a grant, is as irrevocable as a license by deed of grant, provided only that the grant is of a nature capable of being made by parol.[5]

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1 H. & N., 37; *Russell* v. *Harford* (1866), L. R., 2 Eq., 507; 15 L. T., 171; *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397; I. E. Act, s. 59, *see* App. VII, and *see* under "Extinction of Licenses," *infra*, pp. 675, 676.

[1] *Ubi sup.* at p. 543.

[2] *Wallis* v. *Harrison*, *ubi sup.* at p. 543.

[3] *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98. The same principle applies to the case of an easement, *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397.

[4] *Wood* v. *Leadbitter* (1845), 13 M. & W., 838 (844); *Krishna* v. *Rayappa*, *ubi sup.*; *Prosonna Coomar Singh* v. *Ram Coomar Ghose* (1889), I. L. R., 16 Cal., 640.

[5] *Wood* v. *Leadbitter*, *ubi sup.* at p. 845.

Again, the power of reveking a mere license is not affected by the fact that the license has been given for valuable consideration.[1]

Wood v. *Leadbitter*.

This power of revocation was fully considered and emphatically affirmed by the Court of Exchequer in the important case of *Wood* v. *Leadbitter*[2] as one of the general principles on which the law of licenses is founded.

This was an action of trespass for assault and false imprisonment, and, at the trial before Baron Rolfe, it appeared that the plaintiff, on the occasion of one of the Doncaster race-meetings, had purchased for one guinea a ticket, issued under the authority of the stewards, and entitling the holder to admission to the grand stand and to the enclosure surrounding it, during every day of the races which lasted four days.

The plaintiff came into the enclosure on one of the race days; and while the races were going on, the defendant, who was an officer of police, under the authority and direction of Lord Eglintoun, who was one of the stewards, desired the plaintiff to leave the enclosure, telling him that if he did not do so, force would be used to turn him out.

Upon the plaintiff refusing to go, the defendant, by the order of Lord Eglintoun, took him by the arm, and, without using any unnecessary violence, put him out of the enclosure.

The learned judge directed the jury, that, assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, it still was lawful for Lord Eglintoun, without returning the guinea, and without giving any reason, to order the plaintiff to quit the enclosure, which admittedly was his property; and that, if the jury were satisfied that notice was given to the plaintiff, requiring him to leave the enclosure, and that, before he was forcibly removed by the defendant, a reasonable time had elapsed during which he might have gone away voluntarily, then the plaintiff was not, at the time of the removal, on the ground by the leave and license of Lord Eglintoun.

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[1] *Ibid.* at p. 855.

[2] *Ubi sup.*

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Upon this direction, the jury found a verdict for the defendant.

A rule *nisi* having been obtained for a new trial, on the ground of misdirection, it was contended, in support of the rule, on the authority of *Taylor* v. *Waters*[1] and other cases, that, independently of any grant from Lord Eglintoun, the plaintiff had license from him to be in the enclosure at the time he was turned out, and that such license was under the circumstances irrevocable.

The Court, in discharging the rule, held that a parol license to come and remain for a certain time on the land of another, though money be paid for it, is revocable at any time, and without returning the money.

The judgment of the Court which was delivered by Baron Alderson, and is an exhaustive exposition of the law, contains the following observations[2]: "A mere license is revocable: "but that which is called a license is often something more "than a license; it often comprises or is connected with a "grant, and then the party who has given it cannot in "general revoke it, so as to defeat his grant, to which it was "incident. It may further be observed, that a license under "seal (provided it be a mere license) is as revocable as a "license by parol; and, on the other hand, a license by parol, "coupled with a grant, is as irrevocable as a license by deed, "provided only that the grant is of a nature capable of being "made by parol. But where there is a license by parol, "coupled with a parol grant, or pretended grant, of something "which is incapable of being granted otherwise than by deed, "there the license is a mere license; it is not an incident to "a valid grant, and it is therefore revocable. Thus, a license "by A to hunt in his park, whether given by deed or by "parol, is revocable; it merely renders the act of hunting "lawful, which, without the license, would have been unlawful. "If the license be, as put by Chief Justice *Vaughan*, a license "not only to hunt, but also to take away the deer when killed

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[1] (1816) 7 Taunt., 374; 18 R. R., 499.

[2] 13 M. & W. at p. 344.

"to his own use, this is in truth a grant of the deer with a "license annexed to come on the land: and supposing the "grant of the deer to be good, then the license would be "irrevocable by the party who had given it; he would be "estopped from defeating his own grant, or act in the nature "of a grant. But suppose the case of a parol license to come "on my lands, and there to make a watercourse, to flow on "the land of the licensee. In such a case there is no valid "grant of the watercourse,[1] and the license remains a mere "license, and therefore capable of being revoked. On the "other hand, if such a license were granted by deed, then "the question would be on the construction of the deed, "whether it amounted to a grant of the watercourse; and if "it did, then the license would be irrevocable."

Tayler v. *Waters.* *Wood* v. *Leadbitter.*

In another part of the same judgment the learned Baron severely criticises the decision in *Tayler* v. *Waters*[2] that a license conferred by a ticket to enter a theatre, purchased for valuable consideration, was an irrevocable license, and points out that it is contrary to general principles and unsupported by the earlier authorities.

He says[3]—

"This judgment is stated by the learned reporter to have "comprised the substance of the arguments on both sides, and "which, therefore, he does not give in his report. We must "infer from this that the attention of the Court was not called "in the argument to the principles and earlier authorities, "to which we have adverted. Brooke, in his Abridgment, "*Dodderidge*, in the case of *Webb* v. *Paternoster*,[4] and Lord "*Ellenborough*, in the case of *Rex* v. *Horndon-on-the-Hill*,[5]

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[1] Because under the English law, the grant of the watercourse must be by deed, *see* also *Hewlins* v. *Shippam* (1826), 5 B. & C., 221; 31 R. R., 757; *Cocker* v. *Cowper* (1834), 1 C. M. & R., 418; *Aldin* v. *Latimer Clark, Muirhead & Co.* (1894), 2 Ch., 437 (448). In India the same consequence would follow in a case falling within the provisions of the Transfer of Property Act and Registration Act as to writing and registration; *see* further *supra* on the subject of license by express grant, p. 664.

[2] *Ubi sup.*

[3] 13 M. & W. at p. 851.

[4] (1620) 2 Roll, Rep., 143; Poph., 151; Palmer, 71.

[5] (1816) 4 Maule & Sel., 562.

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"all state in the most distinct manner that every license "is and must be in its nature revocable, so long as it is a "mere license. Where, indeed, it is connected with a grant, "there it may, by ceasing to be a naked license, become "irrevocable; but then it is obvious that the grant must exist "independently of the license, unless it be a grant capable "of being made by parol, or by the instrument giving the "license. Now in *Tayler* v. *Waters* there was no grant of "any right at all, unless such right was conferred by the "license itself. C. J. *Gibbs* gives no reason for saying that "the license was a license irrevocable, and we cannot but "think that he would have paused before he sanctioned "a doctrine so entirely repugnant to principle and to the "earlier authorities, if they had been fully brought before "the Court."

That the revocability of a mere license is not affected by the grant of the license having been made for valuable consideration is shewn by the following passage in the same judgment[1]:—

"It was suggested that, in the present case, a distinction "might exist, by reason of the plaintiff's having paid a "valuable consideration for the privilege of going on the stand. "But this fact makes no difference: whether it may give the "plaintiff a right of action against those from whom he "purchased the ticket, or those who authorised its being "issued and sold to him, is a point not necessary to be "discussed; any such action would be founded on a breach "of contract, and would not be the result of his having "acquired by the ticket a right of going upon the stand, in "spite of the owner of the soil; and it is sufficient, on this "point, to say, that in several of the cases we have cited "(*Hewlins* v. *Shippam*,[2] for instance, and *Bryan* v. *Whistler*),[3] "the alleged license had been granted for a valuable con-"sideration, but that was not held to make any difference."

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[1] 13 M. & W. at p. 855.
[2] (1826) 5 B. & C., 221; 31 R. R., 757.
[3] (1828) 8 B. & C., 288; 32 R. R., 389.

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Wood v. *Leadbitter* followed in India.

The decision in *Wood* v. *Leadbitter* so far as it affirms on general principles that a mere license is, in its nature, revocable and that a license coupled with a grant is irrevocable, has not been questioned by subsequent English authorities, and has been followed in India.[1]

Equitable exception to power of revocation in case of license coupled with a void grant.

It is, however, to be observed that the general proposition, that a license coupled with a void grant remains nothing but a mere license and is accordingly revocable,[2] must now be taken as subject to the reservation that a licensee under a void lease or agreement for valuable consideration who has entered into occupation and paid rent is in the same position in equity as if a valid grant had been made, and that his license cannot therefore be revoked at will.[3]

When a mere license may become irrevocable.

Further, a mere license is irrevocable when the licensee, acting upon the license, has executed a work of a permanent character and incurred expense in so doing.[4]

Two classes of cases.

This principle applies to two classes of cases, one where the license refers to something to be done on the land of the licensor, the other where the license is to do something on the land of the licensee affecting an easement acquired thereover by the licensor.

Rochdale Canal Co. v. *King.*

Ramsden v. *Dyson.*

The judgments in *Rochdale Canal Company* v. *King*[5] and *Ramsden* v. *Dyson*[6] sufficiently illustrate the application of the principle to the first class of cases, and have already been referred to.[7]

In India the same principle has received statutory[8] and judicial recognition.

The second class of cases has already been considered in connection with the extinction of easements by presumed release.[9]

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[1] I. E. Act, s. 60 (*a*), App. VII; *Prosonna Coomar Singha* v. *Ram Coomar Ghose* (1889), I. L. R., 16 Cal., 640.

[2] *See Wood* v. *Leadbitter* (1845), 13 M. & W., 838 (845); *Hewitt* v. *Isham* (1851), 21 L. J. N. S. Exch., 35; I. E. Act, s. 54, App. VII.

[3] *Walsh* v. *Lonsdale* (1882), 21 Ch. D., 9; *Lowe* v. *Adams* (1901), 2 Ch., 598.

[4] *See* I. E. Act, s. 60 (*b*), App. VII.

[5] (1851) 2 Sim. N. S., 78.

[6] (1866) L. R., 1 H. L., 129.

[7] *See supra*, pp. 665, 666.

[8] I. E. Act, s. 60 (*b*), App. VII; *Land Mortgage Bank of India* v. *Moti* (1885) I. L. R., 8 All., 69.

[9] *See supra*, Chap. IX, Part II, p. 533.

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In cases falling within this rule, if the licensor desires to be able to revoke he must expressly reserve the right when he grants the license, or limit it as to duration.[1]

In such cases power of revocation must be expressly reserved or license limited in duration.

It has been held as an exception to this rule of irrevocability that when a license has been granted by a landlord to a tenant and acted upon by the tenant with the result of causing injury to the natural rights of other tenants, such license is revocable on the ground that in such cases there can be no implied grant of a right to derogate from such natural rights.[2]

Exceptions to this rule.

In such a case where the tenant has acted on the license and incurred expense, the Court will usually permit the revocation of the license upon the terms of the licensor repaying such expense to the licensee.[3]

Further, where according to the general rule a license would be otherwise irrevocable, a licensor may be entitled to relief when the act which he licensed is found to have such injurious consequences as could not have been contemplated by him in its inception.[4]

The question whether or not the licensor is entitled to relief must depend upon the particular facts of each case.[5]

Extinction of licenses.

A license may be determined either by express or implied revocation.[6]

Implied revocation.

A license is determined by implied revocation in, amongst other, the following ways:—

(1) By alienation of the property affected by the license.[7]

Wallis v. *Harrison*.

In *Wallis* v. *Harrison*, Baron Parke said[8]: "If the owner "of land grants to another a license to go over or do any act "upon his close, and then conveys away that close, there is an

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[1] *Liggins* v. *Inge* (1831), 7 Bing., 682 (694).

[2] *Kesava Pillai* v. *Peddu Reddi* (1863), 1 Mad. H. C., 258.

[3] *Ibid.*

[4] *Bankart* v. *Houghton* (1859), 27 Beav., 425; *Kesava Pillai* v. *Peddu Reddi*, *ubi sup.*, at p. 260.

[5] *Ibid.*

[6] I. E. Act, s. 61, App. VII.

[7] *Wallis* v. *Harrison* (1838), 4 M. & W., 538; *Coleman* v. *Foster* (1856), 1 H. & N., 37; *Russell* v. *Harford* (1866), L. R. 2 Eq., 507; 15 L. T., 171; *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397; I. E. Act, s. 61, ill. (*b*), App. VII.

[8] *Ubi sup.* at p. 544.

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"end to the license; for it is an authority only with respect "to the soil of the grantor, and if the close ceases to be his soil "the authority is instantly gone."

(2) By an obstruction of the license by the licensee.

Hyde v. *Graham.*

Thus in *Hyde* v. *Graham*,[1] where the defendant had a right of way by license from the plaintiff, it was held that the plaintiff was entitled to revoke it by placing a gate across the way and fastening and locking it, and that the defendant was not justified in breaking the gate open.[2]

Aldin v. *Latimer Clark, Muirhead & Co.*

So, too, in *Aldin* v. *Latimer Clark, Muirhead & Co.*[3] a license to open ventilators in a building demised to the licensee by the licensor was impliedly revoked by the obstruction of the ventilators by buildings erected upon adjoining property by assigns of the lessor.

Under I. E. Act, s. 62.

(3) When the licensee releases it, expressly or impliedly, to the grantor or his representative.[4]

(4) Where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled.[5]

(5) Where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right.[6]

(6) Where the licensee becomes entitled to the absolute ownership of the property affected by the license.[7]

By non-user, I. E. Act, s. 62 (h).

(7) Where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee.[8]

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[1] (1862) 1 H. & C., 593.

[2] *See* I. E. Act, s. 60, ill. (*a*), App. VII, evidently taken from this case.

[3] (1894) 2 Ch., 437.

[4] I. E. Act, s. 62 (*b*), App. VII.

[5] I. E. Act, s. 62 (*c*), App. VII.

[6] I. E. Act, s. 62 (*d*), App. VII.

[7] I. E. Act, s. 62 (*e*), App. VII.

[8] I. E. Act, s. 62 (*h*), App. VII. This is a similar provision to that contained in s. 47, first and second para., and clause (*a*), providing for the extinction of easements by non-enjoyment. In both cases the Act has substituted a positive rule for what under the general law outside the Act is a matter of evidence; *see supra*, Chap. IX, Part II, C. (I) (*a*), C. (II) (*a*) and (*b*), pp. 537, 550, 558, 559.

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(8) In the case of an accessory license, when the interest or right to which it is accessory ceases to exist.[1]

Implied revocation of accessory license. I. E. Act, s. 62 (*i*).

Other methods of implied revocation of licenses are provided for by the same section to which special reference need not here be made.[2]

Rights of licensee in connection with revocation.

Under a mere license.

Under a license coupled with the grant of a *profit à prendre* enjoyed from year to year.

Under a revocable license a licensee is entitled to have reasonable notice of the revocation of the license,[3] and, after revocation, he has the right to a reasonable time to go off the land affected by the license, and, if he has goods on the licensor's land which he has been licensed to put there, he is entitled to take away such goods and have reasonable time for so doing.[4]

It has been held, in the case of a license coupled with the grant of a *profit à prendre* or incorporeal hereditament and enjoyed in the nature of a tenancy from year to year at an annual payment, that the notice necessary to determine the enjoyment of such a right does not fall within the rigid rule,

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[1] I. E. Act, s. 62 (*i*), App. VII.

[2] For such other methods, *see* I. E. Act, s. 62 (*a*), (*f*), and (*g*), App. VII.

[3] *Mellor* v. *Watkins* (1874), L. R., 9 Q. B., 400; *Aldin* v. *Latimer Clark, Muirhead & Co.* (1894), 2 Ch., 437 (448); *Wilson* v. *Tavener* (1901), 1 Ch., 578.

[4] *Cornish* v. *Stubbs* (1870), L. R., 5 C. P., 334; *Mellor* v. *Watkins*, *ubi sup.*; I. E. Act, s. 63, App. VII. In *Cornish* v. *Stubbs*, Willes, J., said (*ubi sup.* at p. 339): "Under a parol license the licensee has "the right to a reasonable time to go off "the land after it has been withdrawn "before he can be forcibly thrust off it; "and he could bring an action if he were "thrust off before such a reasonable time "had elapsed. That was Lord Cran-"worth's opinion in *Wood* v. *Leadbitter* "(1845), 13 M. & W., 838; for he did not "tell the jury that if they were satisfied "that notice had been given to the "plaintiff to quit the ground the defendant "was justified in removing him, but that "if they were satisfied that such notice "had been given, and that before he was "forcibly removed by the defendant a "reasonable time had elapsed during "which he might have gone away volun-"tarily, then the plaintiff was not, at "the time of the removal, on the ground "by the leave and license of Lord Eglin-"toun; and I take it that the Court of "Exchequer adopted that summing up. "In looking into the judgment in that "case, it will be found that the cases as "to persons putting goods on other per-"sons' land were all reviewed, and the "Court seems to have held that they "were to be dealt with on the same "principle as cases of personal license. "Applying that view to the present case, "I think that the barons would clearly "have thought that the license to put the "goods upon the defendant's land involved "a right to take away his goods, and to "have a reasonable time for doing so. "It was on that ground that the Court "approved of the decision in *Wood* v. "*Manley* (1839), 11 Ad. & E., 34; 3 Per. "& D., 5, which was the case of a license "coupled with an interest."

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applicable to a tenancy of corporeal hereditaments, of a half-year's notice ending with the period at which the tenancy commenced, but that such a right is determinable by such notice, written or verbal, expiring at the same period, as may be a "reasonable notice" in the circumstances.[1]

Where a license is revoked without reasonable notice given, the licensee is not entitled to an injunction to restrain the act whereby the license was extinguished, but only to such damages as have been caused by the extinction of the license without such notice.[2]

Licensee's remedy for revocation of mere license in breach of contract express or implied.

Similarly, if a license, which has been granted for valuable consideration, is revoked in breach of an express or implied contract before the licensee has had full enjoyment of it, the remedy of the licensee lies in an action for damages for breach of contract or implied covenant not to revoke.[3]

Kerrison v. *Smith*.

In *Kerrison* v. *Smith*[4] the plaintiff who was a bill-poster had agreed verbally with the defendant that in consideration of a yearly payment the defendant should let his wall to the plaintiff for posting advertisements, it being one of the conditions of the agreement that the plaintiff should erect in front of the wall a hoarding, on which his advertisements were to be posted. Under this agreement, the plaintiff had posted his advertisements for some time, and had made payments from time to time to the defendant when requested. Subsequently the defendant twice wrote to the plaintiff requiring him to

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[1] *Lowe* v. *Adams* (1901), 2 Ch., 598.

[2] *Aldin* v. *Latimer Clark, Muirhead & Co.*, *ubi sup.*; and *see Wilson* v. *Tavener*, *ubi sup.*

[3] *Wood* v. *Leadbitter* (1845), 13 M. & W., 838 (855); *Kesava Pillai* v. *Peddu Reddi* (1863), 1 Mad. H. C., 258; *Smart* v. *Jones* (1864), 33 L. J. C. P., 154; *Cornish* v. *Stubbs* (1870), L. R., 3 C. P., 334; *Mellor* v. *Watkins* (1874), L. R., 9 Q. B., 400; *Wells* v. *Kingston-upon-Hull Corporation* (1875), L. R., 10 C. P., 402; *Butler* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1888), 21 Q. B. D., 207; *Prosonna Coomar Singha* v. *Ram Coomar Ghose* (1889), I. L. R., 16 Cal., 640; *Kerrison* v. *Smith* (1897), 2 Q. B., 445; I. E. Act, s. 64, [illegible] VII. The case last cited appears to be the first English case in which the point was specifically taken and decided that an action will lie to recover damages for revoking a license, though the previous English authorities above cited appear to recognise the compatibility with one another of the right to revoke a license and the right to maintain an action for breach of contract in respect of the revocation.

[4] (1897) 2 Q. B., 445.

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remove his hoarding and advertisements. These not having been removed, the defendant caused them to be taken down and sent to the plaintiff. In an action by the plaintiff to recover damages for breach of the agreement, the County Court Judge held that, as the agreement amounted to a mere license, the plaintiff had no cause of action and accordingly non-suited him. The Court of Queen's Bench Division decided that the plaintiff was entitled to prove the contract, and to give evidence of such damage as he could shew to have arisen from the breach of the contract by the defendant, and the case was sent back to the County Court for a new trial.

Licensee's remedy for obstruction of irrevocable license by licensor.

If the enjoyment of an irrevocable license is obstructed by the licensor, the remedy of the licensee is either by injunction restraining the licensor from so obstructing,[1] or in damages for breach of contract.[2]

Licensee's remedy for obstruction of mere license by third party

It has been seen that the obstruction of a mere license by the licensor operates as a revocation of it, and that the licensee cannot prevent the revocation, though he may be entitled to damages for breach of contract.

Supposing, however, the obstruction is not caused by the licensor, but by a third party, it remains to be considered what in such case is the remedy of the licensee.

Hill v. *Tupper*. *Heap* v. *Hartley*.

This question was considered in the cases of *Hill* v. *Tupper*[3] and *Heap* v. *Hartley*,[4] where it was decided that a mere license does not create such an estate or interest in the licensee as to enable him to maintain an action in his own name against a third person, for the infringement of his right, and that the only course open to the licensee is to obtain permission from the licensor to sue the wrong-doer in the licensor's name.

And it makes no difference that the license is an exclusive

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[1] *Phillips* v. *Treeby* (1862), 8 Jur. N. S., 711.

[2] *See Smart* v. *Jones* (1864), 33 L. J. C. P., 154; *Kerrison* v. *Smith*, *ubi sup.*

[3] (1863) 2 H. & C., 121; 32 L. J. Exch., 217; 8 L. T., 792.

[4] (1889) 42 Ch. D., 461.

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license, if the person acting in alleged violation of the licensee's rights has no notice of such rights.[1]

Licensee's remedy for obstruction of irrevocable license by third party.

Where, however, the license is irrevocable through being coupled with a grant of immoveable property, or of an interest in land, or *profit à prendre*, the authorities shew that the licensee has a sufficient possessory title to enable him to maintain an action in his own name against a third person for the infringement of his rights.[2]

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[1] *Heap* v. *Hartley* (1889), 42 Ch. D., 461.

[2] *Northam* v. *Bowden* (1855), 11 Exch., 70; *Fitzgerald* v. *Firbank* (1897), 2 Ch., 96.

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APPENDIX I.

THE PRESCRIPTION ACT.

2 & 3 Will. IV., c. 71.

An Act for shortening the Time of Prescription in certain cases.[1]

Lord Tenterden's Act.

[1st August 1832.]

1. WHEREAS the expression "Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the Title to matters that have been long enjoyed is sometimes defeated by showing the Commencement of such Enjoyment, which is in many Cases productive of Inconvenience and Injustice; for Remedy thereof be it enacted by the King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That no Claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant, to any Right of Common or other Profit or Benefit to be taken and enjoyed from or upon any Land of our Sovereign Lord the King, his heirs or successors,[2] or any Land being Parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any Ecclesiastical or Lay Person or Body Corporate, except such matters and things as are herein specially provided for, and except Tithes, Rent, and Services, shall, where such Right, Profit, or Benefit shall have been actually taken and enjoyed by any Person claiming right thereto without Interruption[3] for the full Period of Thirty Years, be defeated or destroyed by showing only that such Right, Profit, or Benefit was first taken or enjoyed at any Time prior to such Period of Thirty Years, but nevertheless such Claim may be defeated in any other way by which the same is now liable to be defeated; and when such Right, Profit, or Benefit shall have been so taken and enjoyed as aforesaid for the full Period of Sixty Years, the Right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was

Claims to Right of Common and other *Profits à prendre*, not to be defeated after Thirty Years' Enjoyment by showing the Commencement.

After Sixty Years' Enjoyment the Right to be absolute, unless had by Consent or Agreement.

[1] Under the Short Titles Act, 1892 (55 Vict., c. 10), may be cited as "The Prescription Act, 1832." As to the history and object of the Act, *see supra*, pp. 409, 413, 414, 415, 416, 431, 438, 567.

[2] *Supra*, p. 463.

[3] *Supra*, pp. 428, 429, 432.

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APPENDIX I.

taken and enjoyed by some Consent or Agreement [1] expressly made or given for that purpose by Deed or Writing.

In Claims of Right of Way or other Easement the Periods to be Twenty Years and Forty Years.

2. And be it further enacted, That no Claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant to any Way or other Easement, or to any Water-course, or the Use of any Water, to be enjoyed or derived upon, over, or from any Land or Water of our said Lord the King, his heirs or successors,[2] or being Parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the Property of any Ecclesiastical or Lay Person, or Body Corporate, when such Way or other Matter as herein last before mentioned shall have been actually enjoyed by any Person claiming Right thereto without Interruption [3] for a full Period of Twenty Years, shall be defeated or destroyed by showing only that such Way or other Matter was first enjoyed at any Time prior to such period of Twenty Years, but nevertheless such Claim may be defeated in any other way by which the same is now liable to be defeated; and where such Way or other Matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the Right thereto shall be deemed absolute and indefeasible,[4] unless it shall appear that the same was enjoyed by some Consent or Agreement expressly given or made for that purpose by Deed or Writing.[5]

Claims to the Use of Light enjoyed for Twenty Years indefeasible unless shown to have been by Consent or Agreement in Writing.

3. And be it further enacted, That when the Access and Use of Light to and for any Dwelling-house, Workshop, or other Building shall have been actually enjoyed [6] therewith for the full Period of Twenty Years without Interruption [7] the Right thereto shall be deemed absolute and indefeasible,[8] any local Usage or Custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly made or given for that purpose by Deed or Writing.[9]

The Periods to be periods before action.

4. And be it further enacted, That each of the respective Periods of Years hereinbefore mentioned shall be deemed and taken to be the Period next before some Suit or Action wherein the Claim or Matter to which such Period may relate shall have been or shall be brought into question,[10] and that no

"Interruption."

Act or other Matter shall be deemed to be an Interruption [11] within the meaning of this Statute, unless the same shall have been or shall be submitted to or acquiesced in for One Year after the Party interrupted shall have had or shall have Notice thereof, and of the Person making or authorizing the same to be made.

Pleadings.

5. And be it further enacted, That in all Actions upon the Case and other Pleadings, wherein the Party claiming may now by Law allege his Right generally, without averring the existence of such Right from Time immemorial, such general Allegation shall still be deemed sufficient, and if the same shall be denied, all and every the Matters in this Act mentioned and provided, which shall be applicable to the Case, shall be admissible in Evidence to sustain or rebut such Allegation; and that in all Pleadings to Actions of

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[1] *Supra*, pp. 414, 466.
[2] *Supra*, p. 463.
[3] *Supra*, pp. 428, 429, 432.
[4] *Supra*, pp. 414, 415.
[5] *Supra*, pp. 414, 466.
[6] *Supra*, pp. 433, 438.
[7] *Supra*, pp. 428, 429, 432.
[8] *Supra*, pp. 414, 415.
[9] *Supra*, pp. 414, 466.
[10] *Supra*, pp. 415, 434, 438.
[11] *Supra*, pp. 428, 429, 432, 461.

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Trespass, and in all other pleadings wherein, before the passing of this Act, it would have been necessary to allege the Right to have existed from Time immemorial, it shall be sufficient to allege the Enjoyment thereof as of Right by the Occupiers of the Tenement in respect whereof the same is claimed for and during such of the Periods mentioned in this Act as may be applicable to the Case, and without claiming in the Name or Right of the Owner of the Fee, as is now usually done; and if the other Party shall intend to rely on any Proviso, Exception, Incapacity, Disability, Contract, Agreement, or other Matter hereinbefore mentioned, or on any Cause or Matter of Fact or of Law not inconsistent with the simple Fact of Enjoyment, the same shall be specially alleged and set forth in answer to the Allegation of the Party claiming, and shall not be received in evidence on any general Traverse or Denial of such Allegation.

Presumption not to be allowed in Claims herein provided for.

6. And be it further enacted, That in the several Cases mentioned in and provided for by this Act, no Presumption shall be allowed or made in favour or support of any Claim, upon Proof of the Exercise or Enjoyment of the Right or Matter claimed for any less Period of Time or Number of Years than for such Period or Number mentioned in this Act as may be applicable to the Case and to the Nature of the Claim.[1]

Proviso for Infants, &c.

7. Provided also, That the time during which any Person, otherwise capable of resisting any Claim to any of the Matters before mentioned, shall have been or shall be an Infant, Idiot, Non compos mentis, Feme Covert, or Tenant for Life, or during which any Action or Suit shall have been pending, and which shall have been diligently prosecuted, until abated by the Death of any Party or Parties thereto, shall be excluded in the Computation of the Periods hereinbefore mentioned, except only in Cases where the Right or Claim is hereby declared to be absolute and indefeasible.[2]

What time to be excluded in computing the Term of Forty Years appointed by this Act.

8.[3] Provided always, and be it further enacted, That when any Land or Water upon, over, or from which any such Way or other convenient Watercourse or Use of Water[4] shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any Term of Life, or any Term of Years exceeding Three Years from the granting thereof, the Time of the Enjoyment of any such Way or other Matter as herein last before mentioned, during the Continuance of such Term, shall be excluded in the Computation of the said Period of Forty Years, in case the Claim shall within Three Years next after the End or sooner Determination of such Term be resisted by any Person entitled to any Reversion expectant on the Determination thereof.

Not to extend to Scotland or Ireland.

9. And be it further enacted, That this Act shall not extend to Scotland or [Ireland].[5]

Commencement of Act.

10. And be it further enacted, That this Act shall commence and take effect on the First Day of *Michaelmas* Term now next ensuing.

Act may be amended.

11. And be it further enacted, That this Act may be amended, altered, or repealed during this present Session of Parliament.

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[1] *Supra*, pp. 431 *et seq.*

[2] *Supra*, pp. 430, 454.

[3] *Supra*, pp. 438, 439, 454, 465.

[4] *Supra*, p. 438.

[5] Extended to Ireland by Act 21 & 22 Vict., c. 42.

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APPENDIX II.

Act XIV of 1859,[1] Section I, Clause 12.

Passed by the Governor-General of India in Council.

[*Received the assent of the Governor-General on the 4th May*, 1859.]

An Act to provide for the Limitation of Suits.

Preamble. Whereas it is expedient to amend and consolidate the laws relating to the limitation of suits; It is enacted as follows:—

Limitation of suits. 1. No suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say:—

* * * * * * *

Limitation of twelve years. Suits for immoveable property. Clause 12. To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose.[2]

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[1] *Supra*, pp. 43, 442.

[2] *Ibid.*

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APPENDIX III.

Act IX of 1871,[1] Sections 1, 24, 27 and 28, and Second Schedule, Articles 31, 32, 40, 118 and 146.

Passed by the Governor-General of India in Council.

[*Received the assent of the Governor-General on the 24th March*, 1871.]

An Act for the Limitation of Suits and for other purposes.

Preamble. WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; And whereas it is also expedient to provide rules for acquiring ownership by possession; It is hereby enacted as follows:—

Short title. 1. This Act may be called "The Indian Limitation Act, 1871:"

Extent of Act. It extends to the whole of British India; but nothing contained in Sections two and three or in Parts II and III applies—

(*a*) to suits instituted before the first day of April, 1873,

(*b*) to suits under the Indian Divorce Act,

(*c*) to suits under Madras Regulation VI of 1831.

Commencement. This Act shall come into force on the first day of July, 1871.

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Continuing nuisance. 24. In the case of a continuing nuisance a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the nuisance continues.[2]

Acquisition of right to easements. 27.[3] Where the access and use of light or air[4] to and for any building has been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative[5]) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right,[7] without interruption,[8] and for twenty years,

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[1] *Supra*, pp. 43, 44, 45, 440, 444, 447, 445, 451, 452, 453, 458, 463, 464.

[2] *See* App. IV as to corresponding section of Act XV of 1877 (s. 23), and the reference to the text thereunder.

[3] *Supra*, pp. 43, 449.

[4] *Supra*, p. 449.

[5] *Supra*, p. 461.

[6] *Supra*, p. 16.

[7] *Supra*, p. 451.

[8] *Supra*, p. 461.

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the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.[1]

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.[2]

Illustrations.

(*a*) *A suit is brought in* 1871 *for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right, without interruption, from* 1st *January* 1850 *to* 1st *January* 1870. *The plaintiff is entitled to judgment.*

(*b*) *In a like suit also brought in* 1871 *the plaintiff merely proves that he enjoyed the right in manner aforesaid from* 1848 *to* 1868. *The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.*

(*c*) *In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.*

Exclusion in favour of reversioner of servient tenement

28.[3] Provided that, when any land or water upon, over or from which any easement (other than the access and use of light and air)[4] has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term, shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest of term, resisted by the person entitled, on such determination, to the said land or water.[5]

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a deceased Hindu widow, had a life interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

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[1] *Supra*, pp. 457, 458.
[2] *Supra*, pp. 447, 449, 461.
[3] *Supra*, pp. 43, 465.
[4] *Supra*, pp. 44, 465.
[5] *Supra*, p. 464.

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SECOND SCHEDULE.

First Division: Suits.

Description of suit.	Period of limitation.	Time when period begins to run.
31. For obstructing a way or a watercourse.[1]	Two years.	The date of the obstruction.
32. For diverting a watercourse.[2]	Ditto.	The date of the diversion.
40. For compensation for any wrong, malfeasance, nonfeasance, or misfeasance, independent of contract and not herein specially provided for.[3]	Ditto.	When the wrong is done or the default happens.
118. Suit for which no period of limitation is provided elsewhere in this Schedule.[4]	Six years.	When the right to sue accrues.
146. For declaration of right to an easement.[5]	Twelve years.	When the easement ceased to be enjoyed by the plaintiff, or the person on whose behalf he sues.

[1] *Supra*, pp. 44, 45.
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*

APPENDIX IV.

Act XV of 1877,[1] Sections 1, 3, 23, 26 and 27, and Second Schedule, Articles 36, 37, 38 and 120.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the assent of the Governor-General on the* 19*th July*, 1877.]

An Act for the Limitation of Suits, and for other purposes.

Preamble. WHEREAS it is expedient to amend the law relating to the limitation of suits, appeals and certain applications to Courts; And whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows:—

Short title. Extent of Act. 1. This Act may be called "The Indian Limitation Act, 1877." It extends to the whole of British India[2]; but nothing contained in Sections two and three or in Parts II and III applies—

(*a*) to suits under the Indian Divorce Act, or

(*b*) to suits under Madras Regulation VI of 1831;

Commencement. And it shall come into force on the first day of October, 1877.

Interpretation clause. 3. In this Act, unless there be something repugnant in the subject or context—

"easement" includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another[3]:—

Continuing breaches and wrongs. 23. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.[4]

26.[5] Where the access and use of light or air[6] to and for any building

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[1] *See supra*, pp. 43, 44, 45, 46, 49, 50, 51, 53, 444, 447, 448, 453, 458, 463, 649.

[2] *Supra*, p. 47.

[3] *See supra*, pp. 6, 7, 43, 44, 45, 49, 51, 53, 203, 214, 220, 226, 242, 448, 465.

[4] *Supra*, pp. 458, 650.

[5] *Supra*, pp. 7, 43, 44, 45, 49, 51, 53, 243, 247, 431, 448, 449, 450, 452, 462, 465, 466, 609, 611.

[6] *Supra*, p. 449.

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have been peaceably[1] enjoyed[2] therewith, as an easement,[3] and as of right,[4] without interruption,[5] and for twenty years,[6]

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative[7] or negative[8]) has been peaceably and openly[9] enjoyed[10] by any person claiming title thereto as an easement and as of right,[11] without interruption,[12] and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.[13]

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant,[14] and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.[15]

Illustrations.

(*a*) *A suit is brought in* 1881 *for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from* 1st *January,* 1860 *to* 1st *January,* 1880. *The plaintiff is entitled to judgment.*

(*b*) *In a like suit also brought in* 1881 *the plaintiff merely proves that he enjoyed the right in manner aforesaid from* 1858 *to* 1878. *The suit shall be dismissed, as no exercise of the right by actual user*[16] *has been proved to have taken place within two years next before the institution of the suit.*

(*c*) *In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.*

27.[17] Provided that, when any land or water upon, over, or from which any easement has been enjoyed[18] or derived has been held under or by virtue

Exclusion in favour of reversioner of servient tenement.

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[1] *Supra*, pp. 450, 451, 452.

[2] *Supra*, pp. 433, 459.

[3] *Supra*, pp. 450, 451.

[4] *Supra*, pp. 450, 451, 452. These words are omitted from corresponding provisions in s. 15 of I. E. Act, *supra*, pp. 448, 452, 453; and *see* App. VII; and from s. 3 of the Prescription Act, *supra*, pp. 438, 448, 452, and *see* App. I.

[5] *Supra*, pp. 453, 461.

[6] *Supra*, p. 449.

[7] *Supra*, p. 22.

[8] *Ibid.*

[9] *Supra*, pp. 454, 456.

[10] *Supra*, pp. 433, 459.

[11] *Supra*, p. 451.

[12] *Supra*, pp. 453, 461.

[13] *Supra*, pp. 45, 449, 455, 457, 466, 607, 649.

[14] *Supra*, pp. 429, 461.

[15] *Supra*, pp. 447, 449, 461.

[16] *Supra*, pp. 102, 459.

[17] *Supra*, pp. 7, 43, 44, 49, 51, 53, 448, 454, 465, 466. For the effect of the corresponding section of the Prescription Act (s. 8) *see supra*, p. 439.

[18] *Supra*, pp. 438, 439.

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APPENDIX IV.

of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.[1]

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a Hindu widow, had a life-interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

* * * * * * *

SECOND SCHEDULE.

First Division: Suits.

Description of suit.	Period of limitation.	Time from which period begins to run.
36. For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for.[2]	Two years.	When the malfeasance, misfeasance or nonfeasance takes place.
37. For compensation for obstructing a way or watercourse.[3]	Three years.	The date of the obstruction.
38. For compensation for diverting a watercourse.[4]	Ditto.	The date of the diversion.
120. Suit for which no period of limitation is provided elsewhere in this schedule.[5]	Six years.	When the right to sue accrues.

[1] *Supra*, p. 464.

[2] *Supra*, pp. 45, 49, 50, 51, 53, 448, 649.

[3] *Ibid.*

[4] *Ibid.*

[5] *Supra*, pp. 45, 49, 50, 51, 53, 448, 649, 650.

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APPENDIX V.

The Specific Relief Act, 1877 (I of 1877),[1]
Sections 3, 5(c), 6 and 52–57.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the assent of the Governor-General on the 7th February*, 1877.]

PART I.

PRELIMINARY.

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3. In this Act, unless there be something repugnant in the subject or context, "obligation" includes every duty enforceable by law.

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5. Specific relief is given.

* * * * * * *

(*c*) by preventing a party from doing that which he is under an obligation not to do.

* * * * * * *

6. Specific relief granted under clause (*c*) of Section 5 is called preventive relief.

PART III.

OF PREVENTIVE RELIEF.

Chapter IX.—Of Injunctions Generally.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.[2] Preventive relief how granted.

[1] *Supra*, pp. 47, 49, 50, 51, 52, 53, 193, 448, 622, 625, 626, 639.

[2] *Supra*, pp. 615, 625.

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Temporary injunctions.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.[1]

Perpetual injunctions.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.[2]

Chapter X.—Of Perpetual Injunctions.

Perpetual injunctions when granted.

54.[3] Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction[4] may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

When the defendant invades or threatens[5] to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases[6] (namely):—

(*a*) where the defendant is trustee of the property for the plaintiff;

(*b*) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;[7]

(*c*) where the invasion is such that pecuniary compensation would not afford adequate relief;[8]

(*d*) where it is probable that pecuniary compensation cannot be got for the invasion;[9]

(*e*) where the injunction is necessary to prevent a multiplicity of judicial proceedings.[10]

EXPLANATION.—For the purpose of this section a trade-mark is property.

Illustrations.

* * * * * * *

(*h*) *In the course of A's employment as a vakil, certain papers belonging to his client, B, come into his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.*[11]

(*i*) *A is B's medical adviser. He demands money of B which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing.*[12]

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[1] Now Act V of 1908, repealing Act XIV of 1882, *see* App. X and *supra*, p. 615.

[2] *Supra*, p. 625.

[3] *Supra*, p. 612.

[4] *Supra*, pp. 625, *et seq.*

[5] *Supra*, pp. 625, 630.

[6] *Supra*, p. 626.

[7] *Supra*, pp. 626, 637.

[8] *Supra*, pp. 626, 627, 630. As to meaning of "adequate relief," *see* p. 627.

[9] *Supra*, pp. 626, 630.

[10] *Supra*, pp. 195, 258, 293, 626, 629.

[11] *Supra*, p. 637.

[12] *Ibid.*

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(j) *A, the owner of two adjoining houses, lets one to B and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing.*[1]

* * * * * * *

(p) *The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.*

* * * * * * *

(r) *A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's mine and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.*[1]

(s) *A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for an injunction restraining A from making the noise.*[2]

(t) *A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.*[3]

* * * * * * *

55. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.[4] Mandatory injunctions.

Illustrations.

(a) *A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act,*[5] *Part IV. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstruct B's lights.*[6]

(b) *A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.*[7]

* * * * * * *

56.[8] An injunction cannot be granted— Injunction when refused.

(a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;[9]

(b) to stay proceedings in a Court not subordinate to that from which the injunction is sought;

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[1] *Supra*, p. 296.
[2] *Supra*, pp. 191, 192.
[3] *Ibid.*
[4] *Supra*, pp. 612, 626, 631, 632, 634.
[5] Now Act XV of 1877, *see* s. 26 of that Act, App. IV.
[6] *Supra*, p. 635.
[7] *Ibid.*
[8] *Supra*, p. 626.
[9] *Supra*, p. 629.

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(*c*) to restrain persons from applying to any legislative body ;

(*d*) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government ;

(*e*) to stay proceedings in any criminal matter ;

(*f*) to prevent the breach of a contract the performance of which would not be specifically enforced ;

(*g*) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance ; [1]

(*h*) to prevent a continuing breach in which the applicant has acquiesced ; [2]

(*i*) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust ;

(*j*) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court ; [3]

(*k*) where the applicant has no personal interest in the matter.

* * * * * * *

Injunction to perform negative agreement.

57.[4] Notwithstanding section 56, clause (*f*), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, expressed or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement ; provided that the applicant has not failed to perform the contract so far as it is binding on him.

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[1] *Supra*, p. 630.

[2] *Supra*, p. 635.

[3] *Supra*, pp. 629, 635.

[4] *Supra*, p. 626.

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APPENDIX VI.

Transfer of Property Act, 1882 (IV of 1882),[1] Sections 6 (c), 8 and 43.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the assent of the Governor-General on the* 17*th February*, 1882.]

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6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force: What may be transferred.

* * * * * * *

(c) *An easement cannot be transferred apart from the dominant heritage.*[2]

* * * * * * *

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.[3] Operation of transfer.

Such incidents include, where the property is land, the easements annexed thereto.[4]

* * * * * * *

And where the property is a house the easements annexed thereto.[5]

* * * * * * *

43. Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of the transfer subsists.[6] Transfer by unauthorized person who subsequently acquires interest in property transferred.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

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[1] *Supra*, pp. 9, 49, 50, 51, 53.
[2] *Supra*, pp. 47, 49, 50, 51, 53.
[3] *Supra*, pp. 306, 308, 309, 310, 331.
[4] *Supra*, pp. 47, 49, 53, 306.
[5] *Ibid.*
[6] *Supra*, p. 313, for the application of the same principle to the case of an easement.

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APPENDIX VII.

The Indian Easements Act, 1882.

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Act No. V of 1882.[1]

(AS AMENDED BY ACT XII OF 1891).

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the assent of the Governor-General on the* 17*th February*, 1882.]

An Act to define and amend the law relating to Easements and Licenses.

Preamble. WHEREAS it is expedient to define and amend the law relating to Easements and Licenses: It is hereby enacted as follows:—

PRELIMINARY.

Short title. 1. This Act may be called "The Indian Easements Act, 1882":

Local extent. It extends to the territories respectively administered by the Governor of

[1] For Statement of Objects and Reasons of the Bill which became Act V of 1882, *see Gazette of India*, 1880, Pt. V, p. 494; for Report of Select Committee, *see ibid.*, 181, Pt. V, p. 1021; and for proceedings and debates in Council relating to the Bill, *see ibid.*, 1881, Supplement pp. 687, 766; and *ibid.*, 1882, Supplement, p. 172. The Act has been extended under s. 5 of the Scheduled Districts Act, 1874 (XIV of 1874), to the Scheduled District of Ajmer-Merwara, *see Gazette of India*, 1897, Pt. II, p. 1415.

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Madras in Council and the Chief Commissioners of the Central Provinces and Coorg [1];

and it shall come into force on the first day of July, 1882. Commencement.

2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from— Savings.

(*a*) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

(*b*) any customary or other right [2] (not being a license) in or over immoveable property which the Government, the public or any person may possess irrespective of other immoveable property; or

(*c*) any right acquired, or arising out of a relation created, before this Act comes into force.

3. Sections 26 and 27 of the Indian Limitation Act, 1877, and the definition of "easement" contained in that Act, are repealed in the territories to which this Act extends.[3] All references in any Act or Regulation to the said sections, or to sections 27 and 28 of Act No. IX of 1871, shall, in such territories, be read as made to sections fifteen and sixteen of this Act. Repeal of Act XV of 1877, sections 26 and 27.

Chapter I.—Of Easements generally.

4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.[4] "Easement" defined.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.[5] Dominant and servient heritages and owners.

Explanation.—In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth: the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity[6]; and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment

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[1] The Act was extended to the territories respectively administered by the Governor of Bombay in Council and the Lieutenant-Governor of the N.-W. P. and Chief Commissioner of Oudh by Act VIII of 1891, *supra*, pp. 7, 47, 48, 50, and *see* App. XI. As to the scope and application of the I. E. Act, 1882, *see supra*, pp. 7, 47, 48, 50, 51, 102, 106, 242, 316, 448, 466, 567, 648.

[2] *Supra*, p. 205.

[3] *Supra*, pp. 7, 43, 45, 465.

[4] *Supra*, pp. 8, 61, 209, 247, 311, 470, 600, 659, 661, 667.

[5] *Supra*, pp. 3, 56. As regards the words "beneficial enjoyment," *see supra*, pp. 8, 58.

[6] *Supra*, p. 8.

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of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.[1]

Illustrations.

(a) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.[2]

(b) A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household out of a spring therein. This is an easement.[3]

(c) A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.[4]

(d) A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.[5]

(e) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.[6]

(f) A is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.[7]

Continuous and discontinuous, apparent and non-apparent, easements.

5. Easements[8] are either continuous or discontinuous, apparent or non-apparent.[9]

A continuous easement is one whose enjoyment is, or may be, continual without the act of man.[10]

A discontinuous easement is one that needs the act of man for its enjoyment.[11]

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.[12]

A non-apparent easement is one that has no such sign.[13]

Illustrations.

(a) A right annexed[14] *to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.*[15]

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1 *Supra*, pp. 6, 203, 220, 226.
2 *Supra*, pp. 4, 101.
3 *Supra*, pp. 6, 130, 203.
4 *Supra*, p. 130.
5 *Supra*, pp. 4, 216, 220.
6 *Supra*, pp. 29, 228.
7 *Supra*, pp. 273, 283.
8 *Supra*, pp. 308, 309.
9 *Supra*, pp. 16, 17.
10 *Supra*, pp. 16, 69, 206, 309.
11 *Supra*, pp. 16, 101, 102.
12 *Supra*, pp. 17, 309, 367, 368.
13 *Supra*, pp. 17, 206.
14 *Supra*, p. 308.
15 *Supra*, pp. 17, 69, 309.

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(b) *A right of way annexed*[1] *to A's house over B's land. This is a discontinuous easement.*[2]

(c) *Rights annexed*[3] *to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.*[4]

(d) *A right annexed*[5] *to A's house to prevent B from building on his own land. This is a non-apparent easement.*[6]

Easement for limited time or on condition.

6. An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.[7]

Easements restrictive of certain rights.

7. Easements are restrictions of one or other of the following rights (namely) :—

Exclusive right to enjoy.

(*a*) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.[8]

Rights to advantages arising from situation.

(*b*) The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.[9]

Illustrations of the Rights above referred to.

(a) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.[10]

(b) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.[11]

(c) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.[12]

(d) The right of every owner of land to so much light and air as pass vertically thereto.[13]

(e) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent soil of another person.[14]

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the "subjacent and adjacent soil"

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[1] *Supra*, p. 308.
[2] *Supra*, p. 17.
[3] *Supra*, p. 308.
[4] *Supra*, p. 309, 367, 368.
[5] *Supra*, p. 308.
[6] *Supra*, p. 206.
[7] *Supra*, pp. 17, 102.
[8] *Supra*, pp. 24, 25, 57.
[9] *Supra*, pp. 24, 25, 57, 69, 103, 106, 107, 189, 191, 260, 283, 284, 285, 287.
[10] *Supra*, p. 69.
[11] *Supra*, pp. 57, 189, 191, 260.
[12] *Supra*, pp. 57, 189, 191.
[13] *Supra*, pp. 24, 57, 258.
[14] *Supra*, pp. 24, 57, 167, 298.

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mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.[1]

(f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.[2]

(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.[3]

(h) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature[4]*; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.*[5]

(i) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.[6]

(j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.[7]

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.[8]

Chapter II.—The Imposition, Acquisition and Transfer of Easements.

Who may impose easements.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.[9]

Illustrations.

(a) A is tenant of B's land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists or for any shorter period.[10]

(b) A is tenant for his life of certain land with remainder to B absolutely.

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[1] *Supra*, pp. 298, 299.
[2] *Supra*, pp. 57, 131, 189, 191, 283.
[3] *Supra*, pp. 57, 285.
[4] *Supra*, pp. 24, 57, 106, 107, 263.
[5] *Supra*, pp. 57, 284.
[6] *Supra*, pp. 57, 119, 132, 287.
[7] *Supra*, pp. 57, 269, 274, 276, 281.
[8] *Supra*, p. 264.
[9] *Supra*, pp. 19, 306, 587.
[10] *Supra*, pp. 311, 587.

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A cannot, unless with B's consent, impose an easement thereon which will continue after the determination of his life-interest.[1]

(c) *A, B and C are co-owners of certain land. A cannot, without the consent of B and C, impose an easement on the land or on any part thereof.*

(d) *A and B are lessees of the same lessor, A of a field X for a term of five years, and B of a field Y for a term of ten years. A's interest under his lease is transferable; B's is not. A may impose on X, in favour of B, a right of way terminable with A's lease.*[2]

Servient owners.

9. Subject to the provisions of section eight, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.[3]

Illustrations.

(a) *A has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of B's stream. B may grant to C the right to divert the water of the stream from noon to sunset: provided that A's supply is not thereby diminished.*[4]

(b) *A has, in respect of his house, a right of way over B's land. B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: provided that A's right of way is not thereby obstructed.*[5]

Lessor and mortgagor.

10. Subject to the provisions of section eight, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.[6]

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Lessee.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.[7]

Who may acquire easements.

12. An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same.[8]

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[1] *Supra*, p. 587.
[2] *Ibid.*
[3] *Supra*, p. 19.
[4] *Ibid.*
[5] *Ibid.*
[6] *Supra*, pp. 311, 587.
[7] *Supra*, p. 311.
[8] *Supra*, pp. 311, 438.

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One of two or more co-owners of immoveable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.[1]

No lessee of immoveable property can acquire, for the beneficial enjoyment of other immoveable property of his own, an easement in or over the property comprised in his lease.[2]

Easements of necessity and quasi-easements.

13. Where one person transfers or bequeaths immoveable property to another,[3]—

(*a*) if an easement in other immoveable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement;[4] or

(*b*) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;[5]

(*c*) if an easement in the subject of the transfer or bequest is necessary for enjoying other immoveable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement;[6] or

(*d*) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.[7]

Where a partition is made of the joint property of several persons,—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement,[8] or

(*f*) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.[9]

The easements mentioned in this section, clauses (*a*), (*c*) and (*e*), are called easements of necessity.[10]

Where immoveable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations.

(*a*) *A sells B a field then used for agricultural purposes only. It is inaccessible except by passing over A's adjoining land or by trespassing on the land of a*

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[1] *Supra*, p. 311.

[2] *Supra*, pp. 312, 452.

[3] *See* the comments on this section, *supra*, pp. 308, 309, 310.

[4] *Supra*, pp. 21, 332.

[5] *Supra*, pp. 23, 309, 340, 342, 345, 348, 351, 352, 353.

[6] *Supra*, pp. 21, 332.

[7] *Supra*, pp. 23, 309, 379, 380.

[8] *Supra*, pp. 21, 332.

[9] *Supra*, pp. 23, 309, 387.

[10] *Supra*, pp. 21, 332.

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stranger. B is entitled to a right of way, for agricultural purposes only, over A's adjoining land to the field sold.[1]

(b) *A, the owner of two fields, sells one to B, and retains the other. The field retained was at the date of the sale used for agricultural purposes only and is inaccessible except by passing over the field sold to B. A is entitled to a right of way, for agricultural purposes only, over B's field to the field retained.*[2]

(c) *A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.*[3]

(d) *A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's hands.*[4]

(e) *A is the owner of a house and adjoining land. The house has windows overlooking the land. A simultaneously sells the house to B and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right to the light, and C takes the land subject to the restriction that he may not build so as to obstruct such light.*[5]

(f) *A is the owner of a house and adjoining land. The house has windows overlooking the land. A, retaining the house, sells the land to B, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.*[6]

(g) *A, the owner of a house, sells B a factory built on adjoining land. B is entitled, as against A, to pollute the air, when necessary, with smoke and vapours from the factory.*[7]

(h) *A, the owner of two adjoining houses, Y and Z, sells Y to B, and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect, and A is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect.*[8]

(i) *A, the owner of two adjoining buildings, sells one to B, retaining the other. C is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.*[9]

(j) *A, the owner of two adjoining buildings, sells one to B and the other to C. C is entitled to lateral support from B's building, and B is entitled to lateral support from C's building.*[10]

(k) *A grants lands to B for the purpose of building a house thereon. B is*

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[1] *Supra*, pp. 23, 332.
[2] *Ibid.*
[3] *Supra*, pp. 24, 342, 345.
[4] *Supra*, p. 341.
[5] *Supra*, p. 385.
[6] *Supra*, pp. 360, 379, 381.
[7] *Supra*, p. 351.
[8] *Supra*, p. 351.
[9] *Supra*, p. 352.
[10] *Supra*, pp. 352, 384.

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entitled to such amount of lateral and subjacent support from A's land as is necessary for the safety of the house.[1]

(l) *Under the Land Acquisition Act*, 1870,[2] *a Railway Company compulsorily acquires a portion of B's land for the purpose of making a siding. The Company is entitled to such amount of lateral support from B's adjoining land as is essential for the safety of the siding.*

(m) *Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.*[3]

(n) *A lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right of way over that land suitable to the business to be carried on by B in the house and grounds.*[4]

Direction of way of necessity.

14. When [a right][5] to a way of necessity is created under section thirteen, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.[6]

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.[7]

Acquisition by prescription.

15.[8] Where the access and use of light or air[9] to and for any building have been peaceably enjoyed[10] therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subject to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right,[11] without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.[12]

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[1] *Supra*, p. 161.

[2] *See* now the Land Acquisition Act (I of 1894), by which Act X of 1870 has been repealed.

[3] *Supra*, pp. 353, 387.

[4] *Supra*, pp. 23, 493.

[5] The words "a right" were substituted for the word "right" by the Repealing and Amending Act, 1891 (XII of 1891), Sch. II, Part I.

[6] *Supra*, pp. 489, 589.

[7] *Supra*, pp. 490, 589.

[8] *Supra*, pp. 247, 413, 466, 609, 611.

[9] *Supra*, pp. 95, 96, 99, 312, 450, 452, 466. The words "as of right" appear in the corresponding provision in s. 26 of Indian Limitation Act, XV of 1877, *supra*, pp. 448, 452, 453, and *see* App. IV. They are omitted from s. 3 of the Prescription Act, *supra*, pp. 438, 448, 452 and *see* App. I.

[10] *Supra*, p. 433.

[11] *Supra*, pp. 450, 452.

[12] *Supra*, pp. 457, 466, 607.

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Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.[1]

Explanation II.—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant,[2] and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.[3]

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.[4]

Explanation IV.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.[5]

When the property over which a right is claimed under this section belongs to Government this section shall be read as if, for the word "twenty years," the words "sixty years" were substituted.[6]

Illustrations.

(*a*) *A suit is brought in* 1883 *for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto, as an easement, and as of right, without interruption, from* 1st *January*, 1862, *to* 1st *January*, 1882. *The plaintiff is entitled to judgment.*

(*b*) *In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed "as an easement" for twenty years.*

(*c*) *In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.*

16.[7] Provided that, when any land upon, over or from which any easement has been enjoyed[8] or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such

Exclusion in favour of reversioner of servient heritage.

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[1] *Supra*, pp. 414, 466, 638.
[2] *Supra*, p. 429.
[3] *Supra*, p. 447.
[4] *Supra*, p. 466.
[5] *Supra*, pp. 131, 466, 467.
[6] *Supra*, pp. 463, 466.
[7] *Supra*, pp. 452, 466.
[8] *Supra*, pp. 438, 439.

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interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.[1]

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C had a life-interest in the land; that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Rights which cannot be acquired by prescription.

17. Easements acquired under section fifteen are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired :—

(*a*) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed :[2]

(*b*) a right to the free passage of light or air to an open space of ground ;[3]

(*c*) a right to surface-water, not flowing in a stream and not permanently collected in a pool, tank or otherwise ;[4]

(*d*) a right to underground water not passing in a defined channel.[5]

Customary easements.

18. An easement may be acquired in virtue of a local custom.[6] Such easements are called customary easements.[7]

Illustrations.

(*a*) *By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.*[8]

(*b*) *By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.*[9]

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[1] For the effect of the corresponding section of the Prescription Act (s. 8), *see supra*, p. 439.

[2] *Supra*, pp. 62, 203, 440.

[3] *Supra*, p. 79.

[4] *Supra*, p. 119.

[5] *Supra*, pp. 120, *et seq.*

[6] *Supra*, pp. 30, 33, 203, 205.

[7] *Supra*, pp. 33, 205.

[8] *Supra*, p. 206.

[9] *Supra*, pp. 30, 205.

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19. When the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.[1]

Transfer of dominant heritage passes easement.

Illustration.

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representatives so long as the lease continues.

Chapter III.—The Incidents of Easements.

20. The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Rules controlled by contract or title.

And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

Incidents of customary easements.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.[2]

Bar to use unconnected with enjoyment.

Illustrations.

(*a*) *A, as owner of a farm Y, has a right of way over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.*[3]

(*b*) *A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.*

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner;[4] and when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.[5]

Exercise of easement.

Confinement of exercise of easement.

Illustrations.

(*a*) *A has a right of way over B's field. A must enter the way at either end, and not at any intermediate point.*[6]

(*b*) *A has a right annexed to his house to cut thatching-grass in B's swamp. A, when exercising his easement, must cut the grass so that the plants may not be destroyed.*

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[1] *Supra*, pp. 308, 309, 310.
[2] *Supra*, pp. 57, 58, 470.
[3] *Supra*, p. 470.
[4] *Supra*, p. 471.
[5] *Supra*, p. 561.
[6] *Supra*, p. 512.

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APPENDIX VII.

Right to alter mode of enjoyment.

23. Subject to the provisions of section twenty-two, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.[1]

Exception—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.[2]

Illustrations.

(a) *A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.*[3]

(b) *A has a right to discharge on B's land the rain-water from the eaves of A's house. This does not entitle A to advance his eaves if, by so doing, he imposes a greater burden on B's land.*[4]

(c) *A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.*[5]

(d) *A, riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.*[6]

Right to do acts to secure enjoyment.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement[7]; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible[8]; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.[9]

Accessory rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.[10]

Illustrations.

(a) *A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.*[11]

(b) *A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain, to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.*[12]

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[1] *Supra*, pp. 472, 484.
[2] *Supra*, p. 514.
[3] *Supra*, pp. 547, 581.
[4] *Supra*, p. 582.
[5] *Supra*, p. 492.
[6] *Ibid.*
[7] *Supra*, pp. 513, 516.
[8] *Supra*, pp. 513, 518.
[9] *Supra*, p. 518.
[10] *Supra*, ~~pp. 19, 20.~~ 516.
[11] *Supra*, p. 516.
[12] *Supra*, p. 517.

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(c) *A, as owner of a certain house, has a right of way over B's land. The way is out of repair, or a tree is blown down and falls across it. A may enter on B's land and repair the way or remove the tree from it.*[1]

(d) *A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.*[2]

(e) *A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.*[3]

(f) *A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.*[4]

(g) *A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away by an inundation. A may enter upon B's land and repair the dam.*

Liability for expenses necessary for preservation of easement.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.[5]

Liability for damage from want of repair.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.[6]

Servient owner not bound to do anything.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage,[7] and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement[8]; but he must not do any act tending to restrict the easement or to render its exercise less convenient.[9]

Illustrations.

(a) *A, as owner of a house, has a right to lead water and send sewage through B's land. B is not bound as servient owner to clear the watercourse or scour the sewer.*

(b) *A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed; but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.*[10]

(c) *A, in respect of his house, is entitled to an easement of support from B's wall. B is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.*[11]

(d) *A, in respect of his mill, is entitled to a watercourse through B's land. B must not drive stakes so as to obstruct the watercourse.*

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[1] *Supra*, pp. 20, 516.
[2] *Supra*, p. 515.
[3] *Supra*, p. 518.
[4] *Supra*, p. 516.
[5] *Supra*, p. 519.
[6] *Supra*, pp. 520, 592.
[7] *Supra*, pp. 166, 522.
[8] *Supra*, pp. 18, 184, 522.
[9] *Supra*, pp. 166, 184, 472, 522.
[10] *Supra*, p. 525.
[11] *Supra*, pp. 133, 166, 519.

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(e) A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light.

Extent of easements.

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect :—

Easement of necessity.

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.[1]

Other easements.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.[2]

In the absence of evidence as to such intention and purpose—

Right of way.

(*a*) a right of way of any one kind does not include a right of way of any other kind[3]:

Right to light or air acquired by grant.

(*b*) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made[4]:

Prescriptive right to light or air.

(*c*) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used[5]:

Prescriptive right to pollute air and water.

(*d*) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose[6]: and

Other prescriptive rights.

(*e*) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.[7]

Increase of easement.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.[8]

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.[9]

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations.

(a) A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.[10]

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[1] *Supra*, p. 489.
[2] *Supra*, pp. 485, 493.
[3] *Supra*, pp. 504, 508.
[4] *Supra*, p. 485.
[5] *Supra*, pp. 95, 96, 97, 99, 450, 474, 479, 584.
[6] *Supra*, p. 492.
[7] *Supra*, pp. 491, 503.
[8] *Supra*, pp. 90, 91, 472, *et seq.*; 478, 576, 581.
[9] *Supra*, p. 481.
[10] *Supra*, pp. 475, 581, 582.

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(b) A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.[1]

(c) A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B's land. A buys a field and unites it to his farm. A is not thereby entitled to take leaves to manure this field.

Partition of dominant heritage.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden of the servient heritage[2]; provided that such annexation is consistent with the terms of the instrument, decree or revenue-proceeding (if any) under which the division was made, and in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations.

(a) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(b) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, the other to B. A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(c) A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

Obstruction in case of excessive user.

31. In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage[3]; provided that such user cannot be obstructed when the obstruction would interfere with the lawful employment of the easement.[4]

Illustration.

A, having a right to the free passage over B's land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive user.[5]

Chapter IV.—The Disturbance of Easements.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.[6]

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[1] *Supra*, pp. 131, 132, 484, 491.
[2] *Supra*, pp. 481, 484.
[3] *Supra*, p. 475.
[4] *Supra*, pp. 476, *et seq.*
[5] *Ibid.*
[6] *Supra*, pp. 209, 600.

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Illustration.

A, as owner of a house, has a right of way over B's land. C unlawfully enters on B's land, and obstructs A in his right of way. A may sue C for compensation, not for the entry, but for the obstruction.

Suit for disturbance of easement.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto: [1] provided that the disturbance has actually caused substantial damage to the plaintiff.[2]

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section thirty-four.[3]

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.[4]

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.[5]

Illustrations.

(*a*) *A places a permanent obstruction in a path over which B, as tenant of C's house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.*[6]

(*b*) *A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to A.*[7]

When cause of action arises for removal of support.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation, unless and until substantial damage [8] is actually sustained.[9]

Injunction to restrain disturbance.

35. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement [10]—

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[1] *Supra*, p. 597.
[2] *Supra*, pp. 596, 631, 639.
[3] *Supra*, pp. 596, 597, 639.
[4] *Supra*, pp. 95, 96, 99, 585, 596, 639.
[5] *Supra*, pp. 99, 596, 639.
[6] *Supra*, pp. 596, 601.
[7] *Supra*, p. 524.
[8] As to meaning of "substantial "damage," *see* s. 33, Expl. I, and *supra*, pp. 134, 596.
[9] *Supra*, pp. 133, 134, 170, 257, 295, 296, 297, 596.
[10] *Supra*, pp. 448, 626.

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(*a*) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this chapter.[1]

(*b*) if the disturbance is only threatened or intended,—when the act threatened or intended must necessarily, if performed, disturb the easement.[2]

36. Notwithstanding the provisions of section twenty-four, the dominant owner cannot himself abate a wrongful obstruction of an easement.[3]

Abatement of obstruction of easement.

Chapter V.—The Extinction, Suspension and Revival of Easements.

37. When, from a cause which preceded the imposition of an easement the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.[4]

Extinction by dissolution of right of servient owner.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section ten.[5]

Illustrations.

(*a*) *A transfers Sultánpur to B on condition that he does not marry C. B imposes an easement on Sultánpur. Then B marries C. B's interest in Sultánpur ends, and with it the easement is extinguished.*[6]

(*b*) *A, in* 1860, *let Sultánpur to B for thirty years from the date of the lease. B, in* 1861, *imposes an easement on the land in favour of C, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. B's interest in Sultánpur then ends, and with it C's easement.*[7]

(*c*) *A and B, tenants of C, have permanent transferable interests in their respective holdings. A imposes on his holding an easement to draw water from a tank for the purpose of irrigating B's land. B enjoys the easement for twenty years. Then A's rent falls into arrear and his interest is sold. B's easement is extinguished.*[8]

(*d*) *A mortgages Sultánpur to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of section ten. The land is sold to D in satisfaction of the mortgage-debt. The easement is not thereby extinguished.*

38. An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.[9]

Extinction by release.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.[10]

An easement may be released as to part only of the servient heritage.[11]

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[1] Ss. 33, 34, and *supra*, pp. 585, 626.
[2] *Supra*, pp. 626, 631.
[3] *Supra*, p. 600.
[4] *Supra*, p. 586.
[5] *Supra*, p. 587.
[6] *Supra*, p. 587.
[7] *Ibid.*
[8] *Ibid.*
[9] *Supra*, pp. 527, 529, 532, 535, 560.
[10] *Supra*, p. 528.
[11] *Ibid.*

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Explanation I.—An easement is impliedly released—

(*a*) where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority ;[1]

(*b*) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.[2]

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.[3]

Illustrations.

(*a*) *A, B and C are co-owners of a house to which an easement is annexed. A, without the consent of B and C, releases the easement. This release is effectual only as against A and his legal representative.*[4]

(*b*) *A grants B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual.*[5]

(*c*) *A, having the right to discharge his eavesdroppings into B's yard, expressly authorizes B to build over his yard to a height which will interfere with the discharge. B builds accordingly. A's easement is extinguished to the extent of the interference.*

(*d*) *A, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.*[6]

(*e*) *A, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on B's land permanently alters the roof, so as to direct the rain-water into a different channel and discharge it on C's land. The easement is impliedly released.*[7]

Extinction by revocation.

39. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.[8]

Extinction on expiration of limited period or happening of dissolving condition.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.[9]

Extinction on termination of necessity.

41. An easement of necessity is extinguished when the necessity comes to an end.[10]

Illustration.

A grants B a field inaccessible except by passing over A's adjoining land. B afterwards purchases a part of that land over which he can pass to his field. The right of way over A's land which B had acquired is extinguished.

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[1] *Supra*, pp. 534, 535.
[2] *Supra*, pp. 536, 558.
[3] *Supra*, pp. 534, 535, 536, 558.
[4] *Supra*, p. 528.
[5] *Ibid.*
[6] *Supra*, p. 536.
[7] *Supra*, p. 558.
[8] *Supra*, p. 587.
[9] *Ibid.*
[10] *Supra*, p. 588.

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42. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.[1]

Extinction of useless easement.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished,[2] unless—

Extinction by permanent change in dominant heritage.

(*a*) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used ;[3] or

(*b*) the injury caused to the servient owner by the change is so slight that no reasonable person could complain of it ;[4] or

(*c*) the easement is an easement of necessity.[5]

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.[6]

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner cannot longer enjoy such easement.[7]

Extinction on permanent alteration of servient heritage by superior force.

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage; and the provisions of section fourteen apply to such way.[8]

Illustrations.

(*a*) *A grants to B, as the owner of a certain house, a right to fish in a river running through A's land. The river changes its course permanently and runs through C's land. B's easement is extinguished.*[9]

(*b*) *Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished.*[10]

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.[11]

Extinction by destruction of either heritage.

Illustration.

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished.[12]

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.[13]

Extinction by unity of ownership.

Illustrations.

(*a*) *A, as the owner of a house, has a right of way over B's field. A mortgages his house, and B mortgages his field to C. Then C forecloses both mortgages*

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1 *Supra*, p. 584.
2 *Supra*, pp. 560, 581, 584.
3 *Supra*, 584.
4 *Supra*, pp. 561, *et seq.*, 581.
5 *Supra*, pp. 584, 588.
6 *Supra*, pp. 583, 584.
7 *Supra*, pp. 588, 590.
8 *Supra*, p. 589.
9 *Supra*, pp. 588, 589.
10 *Supra*, p. 589.
11 *Supra*, pp. 589, 590, 591.
12 *Supra*, p. 590.
13 *Supra*, pp. 530, 591.

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and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(b) The dominant owner acquires only part of the servient heritage: the easement is not extinguished, except in the case illustrated in section forty-one.

(c) The servient owner acquires the dominant heritage in connection with a third person: the easement is not extinguished.

(d) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages: the easements are not extinguished.

(e) The joint owners of the dominant heritage jointly acquire the servient heritage: the easement is extinguished.

(f) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(g) A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished.

Extinction by non-enjoyment.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.[1]

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.[2]

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner.[3]

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.[4]

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.[5]

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.[6]

An easement is not extinguished under this section[7]—

(*a*) where the cessation is in pursuance of a contract between the dominant and servient owners;[8]

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[1] *Supra*, pp. 535, 537, 543, 591, 676.
[2] *Supra*, pp. 535, 558, 591, 676.
[3] *Supra*, p. 558.
[4] *Supra*, p. 559.
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*
[8] *Supra*, pp. 559, 676.

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(*b*) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period; or

(*c*) where the easement is a necessary easement.[1]

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous,[2] such rights shall, for the purposes of this section, be deemed to be a single easement.[3]

Illustration.

A has, as annexed to his house, rights of way from the highroad thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His right of way over Y and Z are not extinguished.[4]

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.[5]

Extinction of accessory rights.

Illustration.

A has an easement to draw water from B's well. As accessory thereto he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section forty-seven. The right of way is also extinguished.[6]

49. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.[7]

Suspension of easement.

50. The servient owner has no right to require that an easement be continued[8]; and, notwithstanding the provisions of section twenty-six, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.[9]

Servient owner not entitled to require continuance.

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.[10]

Compensation for damage caused by extinguishment.

Illustration.

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a

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[1] *Ibid.* and p. 587.
[2] *Supra*, p. 560.
[3] *Supra*, pp. 559, 560.
[4] *Ibid.*
[5] *Supra*, p. 590.
[6] *Ibid.*
[7] *Supra*, p. 590.
[8] *Supra*, pp. 61, 109, 528, 592.
[9] *Supra*, p. 592.
[10] *Ibid.*

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month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.[1]

Revival of easements.

51. An easement extinguished under section forty-five revives (*a*) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion[2]; (*b*) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site;[3] and (*c*) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.[4]

An easement extinguished under section forty-six revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court.[5] A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.[6]

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section forty-seven.[7]

Illustration.

A, as the absolute owner of field X, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

Chapter VI.—Licenses.

"License" defined.

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.[8]

Who may grant license.

53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.[9]

Grant may be express or implied.

54. The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.[10]

Accessory licenses annexed by law.

55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.[11]

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[1] *Ibid.*
[2] *Supra*, p. 591.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Supra*, pp. 532, 591.
[7] *Supra*, pp. 590, 591.
[8] *Supra*, pp. 28, 653, 659, 662, 667.
[9] *Supra*, p. 664.
[10] *Supra*, pp. 664, 665, 674.
[11] *Supra*, pp. 29, 666.

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Illustration.

A sells the trees growing on his land to B. B is entitled to go on the land and take away the trees.[1]

License when transferable.

56. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee;[2] but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.[3]

Illustrations.

(*a*) *A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immoveable property of B. The right cannot be transferred.*

(*b*) *The Government grant B a license to erect and use temporary grainsheds on Government land. In the absence of express provision to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.*

Grantor's duty to disclose defects.

57. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.[4]

Grantor's duty not to render property unsafe.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.[5]

Grantor's transferee not bound by license.

59. When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.[6]

License when revocable.

60. A license may be revoked by the grantor, unless—

(*a*) it is coupled with a transfer of property and such transfer is in force:[7]

(*b*) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.[8]

Revocation express or implied.

61. The revocation of a license may be express or implied.[9]

Illustrations.

(*a*) *A, the owner of a field, grants a license to B to use a path across it. A, with intent to revoke the license, locks a gate across the path. The license is revoked.*[10]

(*b*) *A, the owner of a field, grants a license to B to stack hay on the field. A lets or sells the field to C. The license is revoked.*[11]

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[1] *Supra*, pp. 666, 667.
[2] *Supra*, pp. 28, 668.
[3] *Supra*, pp. 28, 667.
[4] *Supra*, p. 668.
[5] *Ibid.*
[6] *Supra*, pp. 28, 668, 669.
[7] *Supra*, pp. 28, 656, 662, 669, 671, 672, 673, 674.
[8] *Supra*, pp. 535, 674.
[9] *Supra*, p. 675.
[10] *Supra*, p. 676.
[11] *Supra*, p. 675.

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APPENDIX VII.

License when deemed revoked.

62. A license is deemed to be revoked—

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license : [1]

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative : [2]

(*c*) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled : [3]

(*d*) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right : [4]

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the license : [5]

(*f*) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable : [6]

(*g*) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist : [7]

(*h*) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee : [8]

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.[9]

Licensee's rights on revocation.

63. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.[10]

Licensee's rights on eviction.

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.[11]

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[1] *Supra*, p. 677.
[2] *Supra*, p. 676.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Supra*, p. 677.
[7] *Ibid.*
[8] *Supra*, p. 676.
[9] *Supra*, p. 677.
[10] *Ibid.*
[11] *Supra*, p. 678.

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APPENDIX VIII.

History of The Indian Easements Act, 1882.

THE history of the Indian Easements Act appears to be briefly as follows:—For some time prior to the drafting of the original Easements Bill, there had been a growing conviction amongst the Judges in India that the law on the subject of easements should be codified, which law was then (to use the words of Sir Michael Westropp, Chief Justice of Bombay) "for the most part "to be found only in treatises and reports practically inaccessible to a large "proportion of the legal profession in the mofussil and to the Subordinate "Judges." It had been asserted by a Judge of the Punjab Court that the great litigation in the case of urban easements was largely due to the fact that neither the people themselves nor the majority of the Courts understood the principles upon which such disputes should be determined.[1]

On the 20th January 1876, Lord Salisbury addressed a despatch to the Government of India in which, after reciting the various steps taken to reform the Indian laws, he stated that the completion of a code of law was an accepted policy which could not be abandoned without detriment to the people and discredit to the Government, and requested the Governor-General in Council to state the order in which the remaining branches of law should be taken up. In reply to this despatch the Government of India, on the 10th May 1877, after disclaiming any intention of abandoning the codification of the law, proposed that six branches of substantive law should be codified amongst which should be included the subject of easements, and that the codification of Indian law should be carried out in India rather than in England.

To this the Secretary of State replied on the 9th August 1877, sanctioning the course suggested by the Governor-General in Council.[2]

Mr. Whitley Stokes, then Legal Member of Council, thereupon proceeded to draw, amongst others, an Easements Bill, a rough draft of which was circulated in February 1878 to the Local Governments for opinion and excited much criticism.[3]

The Bill was then revised, and, on the 11th February 1879, was submitted

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[1] *See Gazette of India*, July to December, 1880, Part V, p. 476.

[2] *See* Preface to the six codifying Bills laid before the Indian Law Commission, 1879.

[3] *See Gazette of India*, July to December, 1880, Part V, p. 480.

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APPENDIX VIII.

to the Indian Law Commissioners, consisting of Sir Charles Turner, Mr. Justice West and Mr. Whitley Stokes, who in their report, after noticing the twofold objection taken to the Bill that it would, by informing people of their rights, provoke litigation, and abolish, or otherwise interfere with, easements recognised only by local usage, replied thereto with the argument that it was a matter of ordinary experience that people were more prone to bring or resist claims to doubtful than to certain rights, and that by its explicit declarations of the law on points now held doubtful by the people, the Bar and the Judges of the Subordinate Courts, the Bill appeared likely to check rather than increase litigation, and that as to the latter objection that the Bill would interfere with local usages, they had been unable to find in the papers submitted to them a single instance of a right in the nature of an easement that would have been affected *in malam partem* by the Bill.[1]

The Bill, as revised by the Law Commission, extended to the whole of British India, except to the Scheduled Districts mentioned in Act XIV of 1874, but as there were some parts of the country, *e.g.*, Assam and British Burma, where the rights with which it dealt were said to be practically unknown, the expediency was suggested of extending it to towns, leaving the rural districts entirely to their local usages, and of inviting the Local Governments to state whether the extension of the proposed law should be made permissive.[2]

As a result of the labours of the Law Commission, a revised Bill based mainly on the law of England and reproducing with a few amendments and alterations, the draft, as settled by the Law Commission, was, with an accompanying Statement of Objects and Reasons, placed before Council on the 6th November 1880, and circulated to the Local Governments for their opinions.[3]

On the 15th June 1881, Mr. Whitley Stokes placed before Council the opinions of the several Local Governments.[4]

The Bengal Government thought there was no pressing necessity for any legislation on the subject.

The Madras Government, while expressing no opinion on the Bill, sent six opinions of local officers, five of which were on the whole in favour of the Bill.

The Bombay Government had no objection to offer to the details of the Bill in its then existing form, but strongly deprecated its indiscriminate extension to the mofussil, and desired, therefore, that the law should be permissive.

The Chief Commissioner of British Burma was of opinion that an enactment of the kind comprised in the Bill was not at present required in that Province, and would not be understood either by the Burmese people or the Burmese Judges.

The Chief Commissioner of Coorg offered no opinion, but forwarded a favourable opinion from the Superintendent.

The Chief Commissioner of Ajmere and Merwara thought that the provisions of the Bill were neither suitable for, nor required, in that district.

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[1] *See Gazette of India*, July to December, 1880, Part V, p. 480.

[2] *Ibid.*

[3] Abstract of Proceedings of the Council of the Governor-General in India, Vols. XX-XXI, 1881-1882, Part I, p. 150.

[4] *Ibid.*, p. 154.

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The Chief Commissioner of Assam was disposed to think that it would be expedient in the first place to extend the Bill only to towns, leaving the rural population entirely to their local usages.

As a result of these opinions, Mr. Whitley Stokes proposed that the Bill in its then existing form might, with the concurrence of all the Local Governments, be extended to Madras, Coorg and the Central Provinces, and be made extendible to the other parts of British India at the option of the Local Governments.

The Bill was then referred to a Select Committee for settlement.

On the 16th February 1882, Mr. Whitley Stokes introduced the Bill as amended by the Select Committee, and moved that the Act should come into force on the 1st of July 1882, instead of the 1st March 1882, as originally provided in the first section of the Bill, the object being to give time for making careful translations of the Bill into the various vernaculars of the Provinces to which it would apply, and for gaining the necessary familiarity with the provisions of the law. The motion was put and agreed to.[1]

The Bill, as amended, and as applying only to the Presidency of Madras and the Chief Commissionerships of the Central Provinces and Coorg, was then passed into law, but did not actually come into force until the 1st of July 1882.[2]

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[1] Abstract of Proceedings of the Council of the Governor-General in India, Vols. XX-XXI, 1881-1882, Part II, pp. 100, 101.

[2] *Ibid.*, pp. 101-119.

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APPENDIX IX.

Criminal Procedure Code, Act X of 1882, Section 147 (As amended by Act V of 1898).

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the assent of the Governor-General on the* 6*th March*, 1882.]

Disputes concerning easements, etc.

147. Whenever any such Magistrate is satisfied as aforesaid that a dispute likely to cause a breach of the peace exists concerning the right *to do or prevent the doing of anything in or upon any tangible immoveable property*[1] *situate*[2] within the local limits of his jurisdiction, he may inquire into the matter[3]; and may, if it appears to him that such right exists, make an order permitting such thing to be done, or directing that such thing shall not be done, as the case may be, until the person objecting to such thing being done or claiming that such thing may be done, obtains the decision of a competent Civil Court adjudging him to be entitled to prevent the doing of, or to do, such thing as the case may be:

Provided that no order shall be passed under this section permitting the doing of anything where the right to do such thing is exercisable at all times

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[1] Rights of fishery *in alieno solo* and other *profits à prendre* fall within the scope of these words, *see Dukhi Mullah* v. *Halway* (1895), I. L. R., 23 Cal., 55; *Kali Kissen Tagore* v. *Anund Chunder Roy* (1896), I. L. R., 23 Cal., 557. *See* this section referred to *supra*, at pp. 47, 48, 49, 50, 51, 53, 54.

[2] In the place of these words in italics, s. 147 of the amending Criminal Procedure Code, Act V of 1898 (which came into force on the 1st July, 1898), has the following words: "Of use of any land "or water (including any right of way or "other easement over the same)." "For "the purposes of this section the ex- "pression 'land or water' includes "buildings, markets, fisheries, crops or "other produce of land, and the rents "and profits of any such property," *see* the definition in the section.

[3] After this word in s. 147 of the amending Act, the following words are inserted: "in manner provided in s. "145."

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of the year, unless such right has been exercised within three months next before the institution of the inquiry; or, where the right is exercisable only at particular seasons,[1] unless the right has been exercised during *the season next before such institution.*[2]

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[1] After this word s. 147 of the amending Act inserts the words, "or on par- "ticular occasions."

[2] Instead of these words s. 147 of the amending Act has the words: "the last "of such seasons or occasions before such "institution."

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APPENDIX X.

Code of Civil Procedure, Act V of 1908, Order XXXIX, rules 1-5.[1]

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the assent of the Governor-General on the* 21*st March*, 1908.]

ORDER XXXIX.

Of Temporary Injunctions and Interlocutory Orders.

Temporary Injunctions.

Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens, or is about, to remove or dispose of his property with intent to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

Injunction to restrain repetition or continuance of breach.

2.—(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the

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[1] This Act came into force on the 1st January 1909, *see* s. 1 (2). With the exception of ss. 1 and 155 to 158, it extends to the whole of British India except the Scheduled Districts, *see* s. 1 (3). (For a specification of the Scheduled Districts, *see* the Scheduled Districts Act, XIV of 1874, the first schedule.) It has repealed the whole of the former Code, Act XIV of 1882, *see* s. 156 and the fifth schedule. The references to the provisions of the Act of 1882, *supra*, pp. 48, 49, 50, 51, 52, 54, 193, must therefore be taken *mutatis mutandis*, as referring to the provisions of the present Act.

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suit, and either before or after judgment,[1] apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

2.—(2) The Court may by order grant such injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.[2]

2.—(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.[3]

2.—(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.[4]

3. The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.[5]

Before granting injunction, Court to direct notice to opposite party.

4. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.[6]

Order for injunction may be discharged, varied or set aside.

5. An injunction directed to a Corporation is binding not only on the Corporation itself, but also on all members and officers of the Corporation whose personal action it seeks to restrain.[7]

Injunction to Corporation binding on its members and officers.

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[1] *Supra*, p. 615.
[2] *Supra*, p. 618.
[3] *Ibid.*
[4] *Ibid.*
[5] *Supra*, p. 619.
[6] *Supra*, p. 620.
[7] *Ibid.*

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APPENDIX XI.

Act VIII of 1891.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

[*Received the assent of the Governor-General on the 6th March*, 1891.]

An Act to extend the Indian Easements Act, 1882, *to certain areas in which that Act is not in force.*

Whereas it is expedient to extend the Indian Easements Act, 1882, to certain areas in which that Act is not in force;

It is hereby enacted as follows:—

Extension of Act V, 1882, to Bombay and the N. W. Provinces and Oudh.

1. The Indian Easements Act, 1882, is hereby extended to the territories respectively administered by the Governor of Bombay in Council and the Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh.[1]

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[1] *Supra*, pp. 7, 47, 48, 50. The North-Western Provinces and Oudh are now together called the United Provinces.

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